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## ARTICLES

# “REASONABLE” POLICE MISTAKES: FOURTH AMENDMENT CLAIMS AND THE “GOOD FAITH” EXCEPTION AFTER *HEIEN*

KAREN McDONALD HENNING<sup>†</sup>

### INTRODUCTION

Law enforcement officers will make mistakes: mistakes in judgment, mistakes in fact, and mistakes of law. Officers are frequently asked to make split second decisions, and sometimes those decisions are wrong.<sup>1</sup> Yet, because these decisions are necessary, the United States Supreme Court has recognized that police mistakes are inevitable and, to varying degrees, tolerated. First, the Fourth Amendment itself permits police officers to make mistakes and still satisfy the substantive demands of the Amendment.<sup>2</sup> Second, even when officers violate the Fourth Amendment, the Court has ruled that the violation may not have a civil remedy. When individuals bring suits for violations of their constitutional rights under 42 U.S.C. § 1983, the doctrine of qualified immunity shields police officers from liability when their conduct does not violate a clearly established constitutional right.<sup>3</sup> Lastly, a criminal defendant is not able to obtain

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<sup>1</sup> The consequences of these wrong judgments range from inconveniences to tragedies, such as the Cleveland police officer who killed a twelve-year-old boy who had a toy gun in a park in November 2014. See Emma G. Fizsimmons, *12 Year Old Boy Dies After Police in Cleveland Shoot Him*, N.Y. TIMES (Nov. 23, 2014), [www.nytimes.com/2014/11/24/us/boy-12-dies-after-being-shot-by-cleveland-police-officer.html](http://www.nytimes.com/2014/11/24/us/boy-12-dies-after-being-shot-by-cleveland-police-officer.html)).

<sup>2</sup> *Maryland v. Garrison*, 480 U.S. 79 (1987).

<sup>3</sup> *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

suppression of evidence illegally seized if the “good faith” exception to the exclusionary rule applies.<sup>4</sup> In all three situations, the Court calls for a determination of whether the mistake made by the officer was one that can be called “objectively reasonable.”<sup>5</sup> Yet, what the Court means by the term objectively reasonable varies, and this variance sows confusion.

The confusion over what constitutes an objectively reasonable mistake has become more pronounced with the Court’s decision in *Heien v. North Carolina*.<sup>6</sup> Until this decision, the lower federal courts—save the United States Court of Appeals for the Eighth Circuit—had refused to extend the Fourth Amendment’s tolerance of mistakes to police errors about statutory proscriptions in their jurisdiction.<sup>7</sup> Thus, where police officers’ actions were based on mistakes regarding the substantive law in their jurisdiction, the federal courts had concluded that the police officer’s conduct was not consistent with the demands of the Fourth Amendment.<sup>8</sup> Moreover, the federal courts had refused to extend the good faith exception to such mistakes of law.<sup>9</sup>

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<sup>4</sup> *United States v. Leon*, 468 U.S. 897 (1984).

<sup>5</sup> *Garrison*, 480 U.S. at 88; *Leon*, 468 U.S. at 926; *Harlow*, 457 U.S. at 818.

<sup>6</sup> 135 S. Ct. 530 (2014).

<sup>7</sup> *See* *United States v. McDonald*, 453 F.3d 958, 962 (7th Cir. 2006); *United States v. Tibbetts*, 396 F.3d 1132, 1138 (10th Cir. 2005); *United States v. Chanthasouvat*, 342 F.3d 1271, 1279 (11th Cir. 2003); *United States v. King*, 244 F.3d 736, 741 (9th Cir. 2001); *United States v. Miller*, 146 F.3d 274, 279 (5th Cir. 1998). *But see* *United States v. Martin*, 411 F.3d 998, 1001 (8th Cir. 2005) (citing *United States v. Smart*, 393 F.3d 767, 770 (8th Cir. 2005)) (“[T]he validity of a stop depends on whether the officer’s actions were objectively reasonable in the circumstances, and in mistake cases the question is simply whether the mistake, whether of law or fact, was an objectively reasonable one.”).

<sup>8</sup> Indeed, one of the foremost authorities on Fourth Amendment law, Professor Wayne LaFave, wrote in 2004 that “it is well-established Fourth Amendment doctrine that the sufficiency of the claimed probable cause must be determined by considering the conduct and circumstances deemed relevant within the context of the *actual* meaning of the applicable substantive provision, rather than the officer’s claimed interpretation of that statute.” Wayne R. LaFave, *The “Routine Traffic Stop” From Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1847–48 (2004).

<sup>9</sup> *Chanthasouvat*, 342 F.3d at 1279–80; *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000); *United States v. Lopez-Valdez*, 178 F.3d 282, 289 (5th Cir. 1999).

In December 2014, however, the Supreme Court ruled 8–1 in *Heien v. North Carolina*<sup>10</sup> that the demands of the Fourth Amendment can be satisfied when the officer acts based on a mistake regarding the scope of a substantive law. Reasoning that reasonable individuals may make mistakes of law as well as fact, the Court concluded that when a stop is based on a police officer’s objectively reasonable mistake of substantive law, that stop complies with the requirements of the Fourth Amendment.<sup>11</sup> At the same time, both the majority opinion and the concurrence were careful to distinguish the standard for determining whether the mistake was reasonable for purposes of a Fourth Amendment claim from what they clearly viewed as the more permissive standard for determining whether an officer was entitled to qualified immunity.<sup>12</sup> Notably absent from the majority and concurring opinions was any discussion of the relationship between reasonable mistakes under the Fourth Amendment and mistakes that are reasonable for purposes of the good faith exception to the exclusionary rule.

Given *Heien*’s distinction between the standard under the Fourth Amendment and the standard for qualified immunity, we are left after *Heien* with the conclusion that the concept of “objectively reasonable” conduct varies depending on the type of claim the Court is addressing. In particular, *Heien* leaves open both the question of what constitutes a reasonable mistake of law for Fourth Amendment purposes and the question of how that answer relates to the good faith exception to the exclusionary rule. This Article explores these questions. Part I examines how the Court has increased its tolerance of police mistakes, both in addressing Fourth Amendment claims and in the remedial doctrines of qualified immunity and the good faith exception to the exclusionary rule, and it ends with an examination of the *Heien* decision. Part II reviews and evaluates the lower courts’ application of *Heien* from December 2014 through December 2015 on both the substantive Fourth Amendment claims and the good faith exception. This review concludes that while many courts are showing too much deference to police error on substantive Fourth Amendment claims, they also are correctly not considering the good faith exception once they conclude that

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<sup>10</sup> 135 S. Ct. at 540.

<sup>11</sup> *Id.* at 539.

<sup>12</sup> *Id.*; *id.* at 540–41 (Kagan, J., concurring).

there was an unreasonable mistake of law by the police. In short, an unreasonable mistake of law renders the good faith exception not applicable. Part III considers the implications of this conclusion for the good faith exception to the exclusionary rule and concludes that *Heien*—a decision that expands toleration of police error—could also paradoxically provide a possible limiting principle to the expansive language that the Court has used in its most recent good faith exception cases.

### I. THE EVOLVING TOLERANCE OF POLICE MISTAKES

In carrying out their duties, police may make a variety of mistakes. They may misapprehend the facts—for example, mistaking the identity of an individual and arresting the wrong person. They may make a mistake in the reach of the substantive prohibition—for example, thinking that the law requires two working brake lights, when the law only requires one light to be working. They may make a mistake as to what the Fourth Amendment requires, such as concluding that the search incident to arrest exception to the warrant requirement permits warrantless searches of cellphones found on the arrestee. As the law has evolved, the United States Supreme Court has distinguished mistakes of fact—and now as a result of *Heien*, mistakes about statutory proscriptions—from mistakes about the dictates of the Fourth Amendment for purposes of a substantive Fourth Amendment claim.

The Court has also distinguished whether there is a violation of the Fourth Amendment from the question of whether there is a remedy for that violation. Even when there is a Fourth Amendment violation, the violation may not result in a remedy. When examining whether a § 1983 plaintiff is entitled to pursue a claim against an officer, the Court essentially applies a double reasonableness test. The plaintiff must show not only that the conduct was objectively unreasonable under the Fourth Amendment, but that the conduct could not have been reasonably believed to be constitutional.<sup>13</sup> Similarly, with the

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<sup>13</sup> See *Saucier v. Katz*, 533 U.S. 194, 206 (2001) (“[E]ven if a court were to hold that the officer violated the Fourth Amendment by conducting an unreasonable, warrantless search, *Anderson* still operates to grant officers immunity for reasonable mistakes as to the legality of their actions.”); see also Erwin Chemerinsky & Karen M. Blum, *Fourth Amendment Stops, Arrests and Searches in the Context of Qualified Immunity*, 25 *TOURO L. REV.* 781, 786 (2009) (noting that layering the qualified

expansion of the good faith exception, the Court appears to be developing a double reasonableness standard for purposes of the exclusionary rule. The Court has accepted in the good faith exception cases that there was a violation of the Fourth Amendment, and it has gone on to evaluate whether that mistake was objectively reasonable.<sup>14</sup> This Part traces the evolution of the Court’s understanding of acceptable mistakes in Fourth Amendment law, qualified immunity, and the good faith exception. It ends with a description of *Heien* and its understanding of the role of mistakes in evaluating Fourth Amendment claims.

### A. *The Fourth Amendment’s Accommodation of Reasonable Mistakes*

The Fourth Amendment has historically been read as requiring the government to obtain a warrant before engaging in a search or seizure. As the Supreme Court repeated as recently as last year, warrantless searches “are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.”<sup>15</sup> Notwithstanding this admonition, many searches and seizures are in fact lawfully

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immunity standard over the Fourth Amendment reasonableness question “gives the officer a second, if not a third, bite at the apple, because the substantive standard under the Fourth Amendment is very deferential towards the officer, taking into consideration the totality of the circumstances”). A number of observers have argued that this double reasonableness test unjustifiably expands the scope of qualified immunity, and in so doing, limits the effectiveness of § 1983 in deterring official misconduct and compensating victims for violations of their constitutional rights. See, e.g., Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583 (1998); Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229 (2006); Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117 (2009); Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 FORDHAM L. REV. 1913 (2007).

<sup>14</sup> See *Davis v. United States*, 564 U.S. 229, 240 (2011). The Court has similarly limited the reach of Fourth Amendment law through its restrictions on the availability of the exclusionary rule. See Sam Kamin & Justin Marceau, *Double Reasonableness and the Fourth Amendment*, 68 U. MIAMI L. REV. 589, 617–18 (2014); Andrew Guthrie Ferguson, *Constitutional Culpability: Questioning the New Exclusionary Rules*, 66 FLA. L. REV. 623, 638 (2014); Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court Uses an Axe To Take Out the Fourth Amendment Exclusionary Rule*, 81 MISS. L. REV. 1183, 1201–10 (2012); Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687, 732–33 (2011).

<sup>15</sup> *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2452 (2015) (alteration in original) (quoting *Arizona v. Gant*, 556 U.S. 332, 338 (2009)).

conducted without a warrant.<sup>16</sup> Consequently, as the Supreme Court is fond of reminding us, “the ultimate touchstone of the Fourth Amendment is ‘reasonableness.’”<sup>17</sup> Thus, for example, law enforcement officials are excused from the need to obtain a warrant before entering a home when there is probable cause to believe that there are exigent circumstances requiring police action,<sup>18</sup> and they may stop and search a vehicle when there is probable cause to believe there is evidence of a crime in the vehicle.<sup>19</sup> Moreover, police may stop individuals without a warrant under *Terry v. Ohio*<sup>20</sup> when they have a reasonable suspicion that the individual engaged in or was about to engage in a crime, and they may also frisk the person if there is reason to believe the individual is armed and dangerous.<sup>21</sup>

In fact, both the definition of probable cause—a “fair probability” that a crime has been committed<sup>22</sup>—and the definition of reasonable suspicion—“articulable facts” indicating that a crime has been committed, but less than the evidence necessary for probable cause<sup>23</sup>—anticipate that the police officer may well be wrong in her assessment of the facts. Thus, in evaluating whether a warrantless search or seizure—and the scope of any search—was consistent with the requirements of the Fourth Amendment, the Court has assessed the reasonableness of the officer’s conduct in light of the information available to the officer.<sup>24</sup> Consequently, the Court has concluded that the Fourth Amendment is not violated when information becomes available after the fact that shows that the officer was mistaken about the facts.<sup>25</sup> Nor is the Fourth Amendment violated when there is not support for the arrested offense, but there is probable cause for

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<sup>16</sup> *Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (noting that “warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant”).

<sup>17</sup> *Id.* (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)).

<sup>18</sup> *Kentucky v. King*, 563 U.S. 452, 460 (2011) (noting these exigent circumstances include entry to protect the safety of officers or the public, entry in hot pursuit of a fleeing felon, and entry to prevent the imminent destruction of evidence).

<sup>19</sup> *Carroll v. United States*, 267 U.S. 132, 153 (1925).

<sup>20</sup> 392 U.S. 1 (1968).

<sup>21</sup> *Id.* at 27–28.

<sup>22</sup> *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

<sup>23</sup> *Navarette v. California*, 134 S. Ct. 1683, 1687 (2014).

<sup>24</sup> *See infra* text accompanying notes 30–38.

<sup>25</sup> *See infra* text accompanying notes 45–48.

some offense that the accused could have been charged with. In these situations, the Court has held that the reasonableness of the officer’s conduct, viewed from an objective standard, permits the allowance of mistakes.

The Court’s acceptance of police mistakes began in *Brinegar v. United States*,<sup>26</sup> where the Court explored the limitations involved in the standard for probable cause. The Court emphasized that the probable cause standard “deal[s] with probabilities”<sup>27</sup> and requires that the police be given “fair leeway” in enforcing the law.<sup>28</sup> Thus, the Court concluded, “Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part.”<sup>29</sup> However, the Court warned that not all mistakes would be accepted: “[T]he mistakes must be those of reasonable men.”<sup>30</sup>

Based on this understanding of reasonable mistakes, the Court has held that the police complied with the reasonableness requirement of the Fourth Amendment in several cases where the police turned out to have been wrong in their understanding of the facts. First, in *Hill v. California*,<sup>31</sup> the Court held that the Fourth Amendment provided the police with “fair leeway” when the police had probable cause to arrest one person but arrested another individual on the belief that the second person was the first one.<sup>32</sup> Although the Court recognized that the subjective beliefs of the arresting officers could not justify the search and that the officers were “quite wrong” as to the identity of the arrestee, the Court also concluded that the officers did not violate the Fourth Amendment because the mistake of identity was a

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<sup>26</sup> 338 U.S. 160 (1949).

<sup>27</sup> *Id.* at 175.

<sup>28</sup> *Id.* at 176.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> 401 U.S. 797 (1971).

<sup>32</sup> *Id.* In *Hill*, the police had probable cause to arrest Mr. Hill for robbery, went to Mr. Hill’s apartment, and arrested the individual who answered the door. The individual turned out to be a man named Miller, who matched the description given to the police of Hill. The Court held that the arrest of Miller was supported by probable cause, and therefore, the gun and ammunition the police found on the living room table were not seized in violation of the Fourth Amendment. *Id.* at 799–801.



reasonable one.<sup>33</sup> Second, the Court held in *Maryland v. Garrison*<sup>34</sup> that the Fourth Amendment provided fair leeway when the police mistakenly searched the wrong apartment pursuant to a warrant that was premised on the belief that there was only one apartment on the third floor of a building.<sup>35</sup> Finally, the Court explored the role of factual accuracy and mistakes in *Illinois v. Rodriguez*,<sup>36</sup> and it concluded that the police may rely on a third party's consent to enter a property when the facts available to the police at the time of entry would lead a reasonable police officer to believe the third party had authority over the premises.<sup>37</sup> In *Rodriguez*, the Court reiterated that the Fourth Amendment commands "not that [officers] always be correct, but that they always be reasonable."<sup>38</sup>

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<sup>33</sup> *Id.* at 804 (explaining that "probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment").

<sup>34</sup> 480 U.S. 79 (1987).

<sup>35</sup> *Id.* In *Garrison*, the police obtained a warrant supported by probable cause for the apartment of the third floor of a building occupied by a man named McWebb. They realized after they had entered an apartment and discovered drugs that there were two apartments on the third floor and that they had entered the apartment not authorized by the warrant. *Id.* at 80. The *Garrison* Court extended the reasoning in *Hill* to conclude that "the discovery of facts demonstrating that a valid warrant was unnecessarily broad does not retroactively invalidate the warrant." *Id.* at 85. Rather, as in *Hill*, the Court stated that the issue was whether the officer's factual misunderstanding was "objectively understandable and reasonable." *Id.* at 88.

<sup>36</sup> 497 U.S. 177, 179 (1990).

<sup>37</sup> *Id.* at 188. In *Rodriguez*, the police went to an apartment where they found a woman who showed signs of a severe beating. *Id.* at 179. The woman stated that Rodriguez had assaulted her earlier in the day. *Id.* She went with the police to Rodriguez's apartment, and she used her key to the apartment to let the police in. *Id.* Once in Rodriguez's apartment, they saw cocaine and drug paraphernalia in plain view in the living room. *Id.* at 180. They moved into the bedroom where they found Rodriguez asleep and more drugs. *Id.* at 179–80. Rodriguez moved to suppress the drugs on the grounds that the woman had no authority to consent to the entry by the police. *Id.* at 180. The Court agreed that the woman did not in fact have authority to consent to the entry because she had moved out of the apartment a month before the entry, her name was not on the lease for the apartment, and she did not contribute to the rent. *Id.* at 181. Nonetheless, the Court held that the search could be upheld if a reasonable officer would have believed that the woman had authority to consent to the entry. *Id.* at 188.

<sup>38</sup> *Id.* at 185 ("[W]e have not held that the Fourth Amendment requires factual accuracy."). In evaluating the reasonableness of the officer's conduct, the Court emphasized that the standard was an objective one judged from the perspective of an officer "of reasonable caution." *Id.* at 188.

The Court’s tolerance for mistakes was expanded beyond factual errors in *Michigan v. DeFillippo*<sup>39</sup> to include situations in which an officer had facts indicating a violation of a statute that was later deemed to be unconstitutionally vague.<sup>40</sup> In reaching the conclusion that such an arrest was supported by probable cause, the Court relied on the same distinction between the standards required for a valid arrest and the standards for a conviction that the Court pointed to in *Brinegar*.<sup>41</sup> Because there was no indication that the police officer should have known that the statute was unconstitutional, the Court concluded that the mistake—an arrest based on an unconstitutional statute—did not necessitate the conclusion that the arrest lacked probable cause.<sup>42</sup> The Court rested this conclusion on the rationale that it was not in the public interest for police officers to decide whether to enforce a law based on the officer’s evaluation of the constitutionality of the statute.<sup>43</sup> Thus, the Court held that the arrest was valid when the officer had sufficient facts to conclude that there was probable cause to believe that the individual violated a statute that had not been declared to be unconstitutional, at least where the statute was not “so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.”<sup>44</sup>

The Court has also extended the leeway provided to police officers under the Fourth Amendment’s reasonableness standard to situations in which there is probable cause to arrest for some offense, regardless of the actual motivations of the officers or the offense for which the accused was actually arrested. In *Whren v. United States*,<sup>45</sup> the Court rejected the defendant’s claim that the stop of his vehicle should be found unconstitutional because the claimed offense was a pretext for a stop actually motivated by the officer’s belief—unsupported by probable cause—that the driver and passenger were engaged in illegal drug dealing.<sup>46</sup> The Court

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<sup>39</sup> 443 U.S. 31 (1979).

<sup>40</sup> *Id.* at 39–40.

<sup>41</sup> *Id.* at 36.

<sup>42</sup> *Id.* at 35–36.

<sup>43</sup> *Id.* at 38 (“Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement.”).

<sup>44</sup> *Id.*

<sup>45</sup> 517 U.S. 806 (1996).

<sup>46</sup> *Id.* at 815–16, 819.

found that the actual motivation of the police officer involved was constitutionally irrelevant;<sup>47</sup> what mattered was whether there was probable cause based on the facts for a reasonable officer to conclude an offense occurred.<sup>48</sup> And, in *Devenpeck v. Alford*,<sup>49</sup> the Court extended this logic to hold that whether there was probable cause for the arrest depends on whether the facts known to the arresting officer provided probable cause for an offense, regardless of the actual charge cited by the arresting officer at the time of the arrest.<sup>50</sup>

In both *Whren* and *Devenpeck*, the Court expressly eschewed any evaluation of the subjective intent of the police officers.<sup>51</sup> Instead, the Court repeatedly emphasized that the reasonableness standard required the courts to apply objective standards of conduct.<sup>52</sup> Inquiry into the subjective intent of the officer involved could render arrests made under the same set of facts vary in their consequences,<sup>53</sup> and this result would be contrary to the Fourth Amendment's command that the conduct of government officials be objectively reasonable.<sup>54</sup> Thus, as long

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<sup>47</sup> *Id.* at 813 (“Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”). As Professor LaFave pointed out, the analysis done by the Court in *Whren* leaves much to be desired. LaFave, *supra* note 8, at 1859. While it is clear that all members of the Court rejected an inquiry into the motives of the particular officer, it is by no means clear why the subjective motivations should be deemed irrelevant in analyzing whether a stop was reasonable. *Id.* at 1854–58. Indeed, as Professor LaFave concluded, the Court's analysis in the case in essence “trivialize[d] what in fact is an exceedingly important issue regarding a pervasive law-enforcement practice.” *Id.* at 1859.

<sup>48</sup> *Whren*, 517 U.S. at 810. Moreover, in *Atwater v. City of Lago Vista*, a driver was arrested and taken to jail for a misdemeanor offense that did not have the possibility of jail time as a punishment. 532 U.S. 318, 323 (2001). The Court concluded that the arrest was consistent with the Fourth Amendment because once an officer has probable cause to believe an individual “has committed even a very minor criminal offense,” that individual may be arrested as a matter of Fourth Amendment law even if the arrest is not authorized under state law. *Id.* at 354.

<sup>49</sup> 543 U.S. 146 (2004).

<sup>50</sup> *Id.* at 152–54.

<sup>51</sup> See *supra* notes 47 and 50 and accompanying text.

<sup>52</sup> E.g., *Whren*, 517 U.S. at 814 (“[T]he Fourth Amendment's concern with ‘reasonableness’ allows certain actions to be taken in certain circumstances, whatever the subjective intent.”); *Horton v. California*, 496 U.S. 128, 138 (1990) (“[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.”); *Brinegar v. United States*, 338 U.S. 160, 176 (1949) (“[T]he mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.”).

<sup>53</sup> *Devenpeck*, 543 U.S. at 154.

<sup>54</sup> See *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990).

as the facts provide probable cause for an arrest for some crime in the jurisdiction, the arrest complies with the Fourth Amendment.

In short, the "fair leeway" that the Court first provided to law enforcement in the *Brinegar* decision has evolved into a "reasonableness" inquiry with substantial allowance for error. Indeed, as Professors Kamin and Marceau recently noted, the current approach to Fourth Amendment claims "tends to skew in favor of government conduct at the expense of individual liberty."<sup>55</sup> Moreover, at the same time as the Court was reading the protections of the Fourth Amendment in a manner that favored the government, the Court also restricted the availability of relief both in the context of civil law suits seeking redress for constitutional violations and in criminal prosecutions.<sup>56</sup> Thus, as is shown in the next section, even when the Fourth Amendment did not tolerate police officers' errors, the Court has shielded many of those errors from any real consequences with two remedial doctrines: the doctrine of qualified immunity and the good faith exception to the exclusionary rule.

### *B. The Evolution of Qualified Immunity and Good Faith Exception to the Exclusionary Rule*

In 1961, the Supreme Court issued two seminal decisions involving the enforcement in federal constitutional rights: *Monroe v. Pape*,<sup>57</sup> which permitted victims of constitutional violations to use 42 U.S.C. § 1983 to obtain a federal remedy in federal courts, and *Mapp v. Ohio*,<sup>58</sup> which extended the exclusionary rule to the states. Both decisions saw remedies as an essential part of the rights and drew from the pronouncement in *Marbury v. Madison*<sup>59</sup> that where there is a right, there is a remedy.<sup>60</sup> Yet, as both qualified immunity and the good faith

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<sup>55</sup> Kamin & Marceau, *supra* note 14, at 618.

<sup>56</sup> Erwin Chemerinsky, *Closing the Courthouse Doors*, 90 DENVER U. L. REV. 317, 326–30 (2012); Pamela S. Karlan, *The Transformation of Judicial Self-Restraint*, 100 CAL. L. REV. 607, 611–13 (2012); Nancy Leong & Aaron Belzer, *Enforcing Rights*, 62 U.C.L.A. L. REV. 306, 314–16 (2015).

<sup>57</sup> 365 U.S. 167 (1961).

<sup>58</sup> 367 U.S. 643 (1961).

<sup>59</sup> 5 U.S. 137 (1803).

<sup>60</sup> *Id.* at 163 ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."). As Professor Harmon explained in her article, the *Monroe v. Pape* and

exception have evolved, the constitutional right and the remedy for violations of those rights have been consciously decoupled. This decoupling, in turn, has led to a situation in which constitutional violations do not necessarily result in any consequences for the government.

### 1. The Origins of Qualified Immunity and the Good Faith Exception to the Exclusionary Rule

From early in the modern civil rights era, the Court recognized that the doctrine of qualified immunity was a necessary restriction in § 1983 cases to protect societal interests in ensuring that official decision making was not skewed by fear of liability for any mistake.<sup>61</sup> At the same time, the Court recognized that inherent in the granting officials immunity was a balance of evils between the vindication of constitutional rights and the social costs of subjecting officials to liability.<sup>62</sup> The Court had originally envisioned qualified immunity as a doctrine that protected those who either acted in good faith<sup>63</sup> or objectively did not or should not have known that their conduct violated a

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*Mapp* decisions were based on the Court's judgment that local and state governments had failed to adequately protect individuals from police misconduct. Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 765 (2012). By expanding the exclusionary rule to the states, and by permitting victims of police overreaching to sue under 42 U.S.C. § 1983, the Court, in Professor Harmon's opinion, "allocated wholesale the responsibility for solving the problem of policing to courts and promoted the regulation of the police primarily by constitutional adjudication." *Id.* Even if Professor Harmon's account is arguably overstated, there is no doubt that she is correct in asserting that the Warren Court saw the remedies it adopted in the *Mapp* and *Monroe v. Pape* decisions as essential for ensuring that the constitutional rights of citizens were respected. See Pamela S. Karlan, *Shoe-Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century*, 78 UMKC L. REV. 875, 882 (2010).

<sup>61</sup> *Scheuer v. Rhodes*, 416 U.S. 232, 242 (1974) ("Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.")

<sup>62</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 813 (1982). The Court recognized in this decision that "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Id.* at 814. At the same time, the Court enumerated the costs to both the individual officials and "to society as a whole." *Id.* As the Court explained, "[t]hese social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office," as well as the threat to the official decision-making will be made with an eye toward potential liability. *Id.*

<sup>63</sup> See *Scheuer*, 416 U.S. at 245–46.

constitutional right.<sup>64</sup> However, in *Harlow v. Fitzgerald*,<sup>65</sup> the Court rejected this good faith standard because it permitted "bare allegations of malice" to force officials to participate in litigation and face potential liability.<sup>66</sup> In order to provide sufficient protections for government officials, the *Harlow* Court concluded that officials should be "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."<sup>67</sup> Thus, after *Harlow*, in order to avoid the bar of qualified immunity, a § 1983 plaintiff had to make a two part showing: (1) his or her constitutional rights were violated, and (2) the right was clearly established at the time of the violation.<sup>68</sup>

Two years after the Court decided *Harlow*, the Court recognized a good faith exception to the exclusionary rule in *United States v. Leon*.<sup>69</sup> As Professor Laurin has shown, the *Leon* decision borrowed significantly from the *Harlow* decision and envisioned a similar two-step process in which the finding of a constitutional violation was separated from any remedial consequences for that violation.<sup>70</sup> In *Leon*, a search had been conducted pursuant to a warrant that was later determined to lack probable cause, and the question before the Court was whether there should be an exception to the exclusionary rule to permit the introduction of the evidence seized pursuant to the warrant later found to be defective.<sup>71</sup> In answering this question, the Court began its analysis by distinguishing the issue of whether the Fourth Amendment was violated from the question of whether the exclusion of evidence was appropriate.<sup>72</sup> The Court justified this decoupling by citing the "substantial social costs exacted by the exclusionary rule."<sup>73</sup> Moreover, although the

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<sup>64</sup> *Wood v. Strickland*, 420 U.S. 308, 322 (1975).

<sup>65</sup> 457 U.S. 800.

<sup>66</sup> *Id.* at 817–18.

<sup>67</sup> *Id.* at 818.

<sup>68</sup> *See id.*

<sup>69</sup> 468 U.S. 897 (1984).

<sup>70</sup> Jennifer Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 699–704 (2011). See Maclin & Rader, *supra* note 14, at 1211–14, for a similar discussion.

<sup>71</sup> *Leon*, 468 U.S. at 900.

<sup>72</sup> *Id.* at 906.

<sup>73</sup> *Id.* at 907. Amongst these perceived social costs were the interference with the adversary system's truth-seeking function by excluding relevant evidence, the

Court in *Mapp v. Ohio*<sup>74</sup> has justified the extension of the exclusionary rule to the states as “an essential part of both the Fourth and Fourteenth Amendments,”<sup>75</sup> the *Leon* decision emphasized that the exclusionary rule was simply a “judicially created remedy” that was designed to deter illegal conduct rather than provide a right to individuals.<sup>76</sup> After decoupling the exclusionary rule from the Constitution and limiting the justification for the rule to deterrence, the Court recognized a good faith exception to the exclusionary rule that permitted the introduction of evidence when the police obtained evidence pursuant to a facially valid warrant, even if it was later determined that the warrant was not valid under Fourth Amendment standards.<sup>77</sup>

Despite the nomenclature of a good faith exception to the exclusionary rule, the *Leon* Court made clear that, as was the case with the *Harlow* qualified immunity standard, the officer's own subjective beliefs were irrelevant for purposes of the exception. Rather, the question to be answered was whether the conduct of the police officer was objectively reasonable.<sup>78</sup> The *Leon* Court acknowledged that it had recently eliminated the subjective inquiry in qualified immunity cases in its *Harlow* decision.<sup>79</sup> And, the Court explained that under the test it was adopting in suppression cases, the “good faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization.”<sup>80</sup> It is not difficult to see how this language mirrors *Harlow's* language that qualified

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risk that some guilty could go free, and the fear that insistence on the application of the exclusionary rule “may well ‘generat[e] disrespect for the law and administration of justice.’” *Id.* at 908 (quoting *Stone v. Powell*, 428 U.S. 465, 491 (1976)).

<sup>74</sup> 367 U.S. 643 (1961).

<sup>75</sup> *Id.* at 657. The *Mapp* Court saw the exclusionary rule as not only deterring police misconduct, but as promoting the integrity of the judiciary. *Id.* at 656, 659.

<sup>76</sup> *Leon*, 468 U.S. at 906.

<sup>77</sup> *Id.* at 913. On the same day that the Court issued *Leon*, the Court issued another decision in which it held that the exclusionary rule did not apply to evidence seized pursuant to a warrant when the judge had forgotten to make “clerical corrections” to that warrant. *Massachusetts v. Sheppard*, 468 U.S. 981, 991 (1984).

<sup>78</sup> *Leon*, 468 U.S. at 919 n.20 (“We emphasize that the standard of reasonableness we adopt is an objective one.”).

<sup>79</sup> *Id.* at 922 n.23.

<sup>80</sup> *Id.*

immunity does not protect an official when the "official could be expected to know that certain conduct would violate statutory or constitutional rights."<sup>81</sup>

## 2. The Evolution of Qualified Immunity Doctrine

As originally formulated by *Harlow*, the qualified immunity "clearly established" standard placed responsibility on officials to ascertain the limits of lawful conduct. The Court explained, "If the law [is] clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct."<sup>82</sup> Moreover, *Harlow* acknowledged that "[t]he greater power of [high] officials . . . [the] greater potential for a regime of lawless conduct," and therefore, "[d]amages actions . . . were . . . 'an important means of vindicating constitutional guarantees.'"<sup>83</sup> Yet, *Harlow* also justified its revised qualified immunity test on the perceived negative impact of litigation and potential liability on officials and the public.<sup>84</sup> Thus, three years after the *Harlow* decision, the Court determined that qualified immunity was a legal question because of the need to dismiss cases as quickly as possible where liability was not warranted.<sup>85</sup> The following year, in *Malley v.*

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<sup>81</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

<sup>82</sup> *Id.* at 818–19.

<sup>83</sup> *Id.* at 809 (citations omitted).

<sup>84</sup> *Id.*

<sup>85</sup> See generally *Mitchell v. Forsyth*, 472 U.S. 511 (1985). In this case, the Court announced that whether there was a clearly established right was "essentially [a] legal question" and that this question should be answered before subjecting officials to substantial discovery. *Id.* at 526. Yet, there was a tension in qualified immunity cases between vindicating constitutional rights by providing a remedy to victims and shielding officials from the negative impact of potential litigation and liability. As Justice Blackmun wrote, § 1983 "stands for . . . the commitment of our society to be governed by law and to protect the rights of those without power against oppression at the hands of the powerful." Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 28 (1985). Thus, while the Supreme Court warned of the perils of litigation in cases such as *Mitchell v. Forsyth*, there were also several cases in which the Court equated the qualified immunity standard to the "fair warning" standard used to evaluate whether a statute was unconstitutionally vague. In *United States v. Lanier*, the Court rejected a state judge's claim that he could not be prosecuted under the criminal analog to § 1983 for sexually assaulting women who went to his chambers on the ground that there had been no prosecutions for such conduct and therefore he was not on notice that his conduct violated a clearly established right. See generally 520 U.S. 259 (1997). The Court rejected this argument on the grounds that "the qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from



*Briggs*,<sup>86</sup> the Court reassured the police officers who were seeking absolute immunity that the qualified immunity standard would be sufficiently protective of their interests, explaining that “[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”<sup>87</sup>

Between 1986 and 2011, when the Supreme Court decided *Ashcroft v. al-Kidd*,<sup>88</sup> *Malley*’s language of “the plainly incompetent or those who knowingly violate the law” appeared sporadically in qualified immunity decisions.<sup>89</sup> For example, in *Hunter v. Bryant*<sup>90</sup> and *Burns v. Reed*,<sup>91</sup> the Court used the quote to explain that the standard of qualified immunity is quite protective of government officials.<sup>92</sup> In addition, several dissents used the quote to object to the majority’s decision to permit a § 1983 suit to move forward or to hold the government officials liable.<sup>93</sup> But, in the vast majority of qualified immunity cases, the Court quoted the basic standard from *Harlow* that officials

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civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes.” *Id.* at 270–71. Similarly, in *Hope v. Pelzer*, a case in which a state prisoner brought a § 1983 action for prison guards tying him to a hitching post for seven hours on a hot Alabama summer day, the Court explained that a right is clearly established when it is “obvious” that officials have “fair warning that their conduct violated the Constitution.” 536 U.S. 730, 741 (2002).

<sup>86</sup> 475 U.S. 335 (1986).

<sup>87</sup> *Id.* at 341.

<sup>88</sup> 563 U.S. 731 (2011).

<sup>89</sup> See *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam).

<sup>90</sup> *Id.*

<sup>91</sup> 500 U.S. 478, 495 (1991).

<sup>92</sup> In *Burns*, the Court rejected a prosecutor’s claim that he was entitled to absolute immunity for giving police advice on the legality of hypnotizing a witness before obtaining her statement. *Id.* In *Hunter*, the Court in a per curiam decision held that Secret Service agents were entitled to qualified immunity for arresting an individual for threatening the plaintiff, even if they were mistaken about whether there was probable cause supporting the arrest. 502 U.S. at 227. As the Court explained, the agents’ decision was “reasonable, even if mistaken.” *Id.* at 229. In *Saucier v. Katz*, the Court cited to *Malley* and used the quote in a parenthetical. 533 U.S. 194, 202 (2001). Curiously, however, the parenthetical was used to support the Court’s understanding that the purpose of the qualified immunity protection was to assure that the official was “on notice that his conduct would be clearly unlawful.” *Id.*

<sup>93</sup> *Groh v. Ramirez*, 540 U.S. 551, 566 (2004) (Kennedy, J., dissenting); *Morse v. Frederick*, 551 U.S. 393, 429 (2007) (Breyer, J., concurring in the judgment in part, and dissenting in part); *Hope v. Pelzer*, 536 U.S. 730, 752 (2002) (Thomas, J., dissenting); *McCleary v. Navarro*, 504 U.S. 966, 967 (1992) (White, J., dissenting from denial of petition for writ of certiorari).

are protected by qualified immunity unless their conduct “violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>94</sup>

The Court made clear, as the qualified immunity doctrine evolved, that qualified immunity shielded officials from liability for legal errors as well as factual mistakes as long as these mistakes were reasonable ones.<sup>95</sup> As the Court noted, qualified immunity provided a shield to officers who made “mere mistakes in judgment, whether the mistake is one of fact or one of law.”<sup>96</sup> Moreover, the Court made clear that the qualified immunity standard was an objective test in which the subjective intent of the official at issue was irrelevant.<sup>97</sup> In fact, the Court’s general approach to qualified immunity made a number of commentators concerned with the approach that the Court was taking on the grounds that it was insufficiently protective of constitutional rights.<sup>98</sup> Indeed, the doctrine worked to require § 1983 plaintiffs to show that the defendant officer was “doubly unreasonable” when the constitutional claim incorporated the concept of reasonableness. For example, in order to defeat a claim of qualified immunity in the context of a Fourth Amendment claim, the plaintiff had to show not only that the officer conducted an

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<sup>94</sup> See, e.g., *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)); *Hope*, 536 U.S. at 739; *Wilson v. Layne*, 526 U.S. 603, 614 (1999).

<sup>95</sup> *Harlow*, 457 U.S. at 818 (“If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to ‘know’ that the law forbade conduct not previously identified as unlawful.”).

<sup>96</sup> *Butz v. Economou*, 438 U.S. 478, 507 (1978); see *Anderson v. Creighton*, 483 U.S. 635, 641 (1993) (“We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable.”); *Brousseau v. Haugen*, 543 U.S. 194, 198 (2004) (“Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted.”).

<sup>97</sup> *Harlow*, 457 U.S. at 817–18; see also *Anderson*, 483 U.S. at 641 (“The relevant question . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed [the] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. Anderson’s subjective beliefs about the search are irrelevant.”).

<sup>98</sup> See, e.g., *Armacost*, *supra* note 13, at 624–34; Alan K. Chen, *Rosy Pictures and the Renegade Officials: The Slow Death of Monroe v. Pape*, 78 UMKC L. REV. 889, 910–11 (2010); David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1217–26 (2005).

unreasonable search, but that the officer's understanding of what was reasonable was unreasonable.<sup>99</sup> Yet, the Court continued to reiterate that the issue in qualified immunity cases was the basic *Harlow* standard: what an objectively reasonable officer would have concluded.<sup>100</sup>

In 2011, when the Court decided *al-Kidd*, however, the Court elevated the *Malley* phrase to something of a rallying cry. In *al-Kidd*, the Court reversed the Ninth Circuit's decision permitting a § 1983 suit to go forward against Attorney General Ashcroft for authorizing the use of the federal material-witness statute to detain individuals suspected of terrorist activities.<sup>101</sup> Because the Court concluded that there was no Fourth Amendment violation, it was unnecessary for the Court to reach the question of whether the conduct violated clearly established law, and yet the Court also examined this question.<sup>102</sup> And, in reaching this second question, the Court made clear that, at least on the rhetorical level, "plainly incompetent or knowingly criminal" was the standard for evaluating whether the official had violated clearly established law.<sup>103</sup> The conclusion of the decision tellingly includes these words:

Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects "all but the plainly incompetent or those who knowingly violate the law." Ashcroft deserves neither label.<sup>104</sup>

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<sup>99</sup> See *Saucier v. Katz*, 533 U.S. 194, 206 (2001) ("[E]ven if a court were to hold that the officer violated the Fourth Amendment by conducting an unreasonable, warrantless search, *Anderson* still operates to grant officers immunity for reasonable mistakes as to the illegality of their actions."); *Anderson v. Creighton*, 483 U.S. 635, 659 (1987) (Stevens, J., dissenting) ("[T]his Court has decided to apply a double standard of reasonableness in damages actions against federal agents who are alleged to have violated an innocent citizen's Fourth Amendment rights. By double standard I mean a standard that affords a law enforcement official two layers of insulation from liability or other adverse consequence, such as suppression of evidence.").

<sup>100</sup> See *supra* note 95 and accompanying text.

<sup>101</sup> See generally 563 U.S. 731 (2011).

<sup>102</sup> *Id.* at 740. In fact, three justices objected to reaching the Fourth Amendment claim in light of the conclusion that there was no clearly established law informing the Attorney General that the use of the material witness statute was unlawful. See *id.* at 745–47 (Ginsburg, J., joined by Breyer and Sotomayor, concurring in the judgment); *id.* at 750–51 (Sotomayor, J., joined by Ginsburg and Breyer, concurring in the judgment).

<sup>103</sup> *Id.* at 743.

<sup>104</sup> *Id.* (citation omitted).

Labeling an official “plainly incompetent” or “knowingly criminal” seems a far cry from *Harlow’s* focus on requiring officials to conform their conduct to established standards, at least rhetorically. Since the decision in *al-Kidd*, the Court has repeated this standard of “plainly incompetent or knowingly criminal” to evaluate whether an official is entitled to the protections of qualified immunity. In a number of cases, this rhetoric has become part of the opening explanation as to how qualified immunity operated.<sup>105</sup> And perhaps not surprisingly, in each of the cases in which the Court has used this rhetorical flourish, the § 1983 claimant has not been able to defeat the claim of qualified immunity.<sup>106</sup> Moreover, the Court in *Messerschmidt* instructed that where the official’s conduct is not knowing criminal, the evaluation of whether a mistake was “reasonable” for purposes of qualified immunity turns on whether the mistake rendered the official “plainly incompetent.”<sup>107</sup> In short, rather than asking whether the official has acted in an objectively reasonable manner,<sup>108</sup> the Court’s rhetoric in qualified immunity cases has taken on a cast of blameworthiness: Is the official “knowingly criminal or plainly incompetent?”

### 3. The Evolution of the Good Faith Exception to the Exclusionary Rule

Just as the Court in qualified immunity cases moved from concerns about compensating those who suffered constitutional wrongs to concerns subjecting officials to the negative impact of litigation and liability, the Court in the good faith exception cases

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<sup>105</sup> See, e.g., *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015); *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015); *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014); *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013); *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244–45 (2012).

<sup>106</sup> In fact, in *Stanton v. Sims*, the Court noted that because “[t]here is no suggestion in this case that Officer Stanton knowingly violated the Constitution; the question is whether, in light of precedent existing at the time, he was ‘plainly incompetent.’” 134 S. Ct. at 5.

<sup>107</sup> *Messerschmidt*, 132 S. Ct. at 1249 (“The officers’ judgment that the scope of the warrant was supported by probable cause may have been mistaken, but it was not ‘plainly incompetent.’”). As Professor Bendlin noted, this shift has moved the inquiry from whether the police acted in an objectively reasonable manner to whether the actions were not “entirely unreasonable.” Susan Bendlin, *Qualified Immunity: Protecting “All But the Plainly Incompetent” (And Maybe Some of Them, Too)*, 45 J. MARSHALL L. REV. 1023, 1045 (2011) (quoting *Messerschmidt*, 132 S. Ct. at 1249)).

<sup>108</sup> See *supra* text accompanying notes 78–81.

shifted from viewing suppression as an intrinsic part of the Fourth Amendment to concerns about the social costs of the exclusionary rule. And, just as the rhetoric involved in § 1983 decisions moved from “what a reasonable officer should know” to protection of all but the “knowingly criminal or plainly incompetent,” the Court has moved from an exception for evidence seized when the police conduct that at the time appeared to be “objectively reasonable” to an inquiry into whether there was “deliberate reckless or grossly negligent” misconduct to justify suppression of evidence.<sup>109</sup>

As was the case with the qualified immunity decision in *Harlow*, the Court in *Leon* placed some onus on the police to ensure that their conduct was consistent with the demands of the Fourth Amendment. Although the *Leon* Court concluded that evidence need not be suppressed where a warrant is later determined to be unsupported by probable cause, it also made clear that the exception to the suppression rule was premised on the police officer having acted with “objective good faith.”<sup>110</sup> At the same time, the *Leon* opinion did introduce a connection between the suppression of evidence and the culpability of the police officer involved by noting that “an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus” of determining whether the evidence should be suppressed.<sup>111</sup> *Leon* also connected the culpability of police officers to the exclusion of evidence in concluding the exclusionary rule was appropriate when there was some sort of misconduct by the police either because the magistrate was misled in issuing the warrant or because the warrant was so facially deficient it was not reasonable for the officer to rely on the warrant in acting.<sup>112</sup>

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<sup>109</sup> *Davis v. United States*, 564 U.S. 229, 238–39 (2011); *Herring v. United States*, 555 U.S. 135, 145 (2009); see Jennifer E. Laurin, Messerschmidt and *Convergence in Action: A Reply to Comments on Trawling for Herring*, 112 COLUM. L. REV. SIDEBAR 119, 121–22 (May 14, 2012); Maclin & Rader, *supra* note 14, at 1189–91.

<sup>110</sup> *Leon*, 468 U.S. at 920. Although some commentators viewed the introduction of any exception to the exclusionary rule with some alarm, see, e.g., Albert W. Alschuler, “Close Enough for Government Work”: *The Exclusionary Rule after Leon*, 1984 S. CT. REV. 309 (1984), *Leon* can be read as consistent with the Fourth Amendment’s preference for warrants. See Kamin & Marceau, *supra* note 14, at 614.

<sup>111</sup> *Leon*, 468 U.S. at 911.

<sup>112</sup> *Id.* at 923. The Court made clear that there were situations in which a finding of “objective good faith” would not be warranted, including when the officer

A few years after *Leon*, in *Illinois v. Krull*,<sup>113</sup> the Court held that the good faith exception applied to evidence seized by officers who relied on a statute that was later invalidated.<sup>114</sup> And, in *Arizona v. Evans*,<sup>115</sup> the Court extended the good faith exception to a situation in which the police relied on a false report of an outstanding warrant transmitted from a judicial officer.<sup>116</sup> Yet, by and large for many years, the good faith exception played a limited role in Fourth Amendment cases, and exclusion of evidence was the general rule.<sup>117</sup> However, in the three most recent Supreme Court decisions on the good faith exception, *Hudson v. Michigan*,<sup>118</sup> *Herring v. United States*,<sup>119</sup> and *Davis v. United States*,<sup>120</sup> the Court has provided significantly more leeway for the government to use evidence obtained in violation of the Fourth Amendment,<sup>121</sup> just as the Court has provided more protection for officials in the qualified immunity arena.

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knew or should have known the information in the affidavit presented to the magistrate was false, when the magistrate had abandoned her objective role, when the affidavit clearly lacked probable cause, and where the warrant was facially invalid. *Id.* Moreover, the Court cautioned that the "objective reasonableness" of the police would be judged collectively to prevent an officer from obtaining a warrant on a "bare-bone[d] affidavit" and then relying on others to execute that warrant. *Id.*

<sup>113</sup> 480 U.S. 340 (1987).

<sup>114</sup> *Id.* at 350 (alteration in original) ("To paraphrase the Court's comment in *Leon*: 'Penalizing the officer for the [legislature's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.'").

<sup>115</sup> 514 U.S. 1 (1995).

<sup>116</sup> *Id.* at 14–16.

<sup>117</sup> Marceau, *supra* note 14, at 745 ("For decades the rule was simple: if the Fourth Amendment was deemed violated, then exclusion was required, regardless of officer culpability."). As Professor Marceau explained, the exclusionary rule was seen as an institutional remedy precluding the use of evidence against a defendant, not as punishment or liability for the individual officer involved. *Id.* at 745 n.289.

<sup>118</sup> 547 U.S. 586 (2006).

<sup>119</sup> 555 U.S. 135 (2009).

<sup>120</sup> 564 U.S. 229 (2011).

<sup>121</sup> In fact, many see this trilogy of cases as moving the good faith exception to the point of threatening to swallow the protections of the Fourth Amendment. See *Davis*, 564 U.S. at 258 (Breyer, J., dissenting) ("[I]f the Court means what it now says, if it would place determinative weight upon the culpability of an individual officer's conduct, and if it would apply the exclusionary rule only where a Fourth Amendment violation was 'deliberate, reckless, or grossly negligent,' then the 'good faith' exception will swallow the exclusionary rule."); Ferguson, *supra* note 14, at 624 ("The Supreme Court has recently directed a sustained legal assault against the exclusionary rule."); Marceau, *supra* note 14, at 741; Maclin & Rader, *supra* note 14, at 1187–89.

In *Hudson v. Michigan*,<sup>122</sup> the Court determined that evidence seized in violation of the Fourth Amendment's knock and announce requirement should not be subject to the exclusionary rule.<sup>123</sup> The Court began its analysis of the question with the pronouncement: "Suppression of evidence . . . has always been our last resort, not our first impulse."<sup>124</sup> Although it acknowledged that *Mapp* had envisioned a much wider role for the exclusionary rule, the Court concluded that *Mapp's* approach had already been rejected in favor of one in which evidence is only suppressed when the deterrent benefits of the rule outweigh the substantial social costs involved in suppressing the evidence.<sup>125</sup> The potential impact of this decision on the exclusionary rule was tempered by the fact that both the majority and the concurrence stressed the lack of a causal connection between the failure to follow the knock and announce procedure and the seizure of the evidence.<sup>126</sup> According to both the majority and concurring opinion, the seizure was caused by the execution of a valid search warrant rather than by the violation of the knock-and-announce procedure.<sup>127</sup> Thus, some commentators concluded that *Hudson* was limited to a more causal connection analysis,<sup>128</sup> a conclusion that seemed reasonable given Justice Kennedy's concurrence specifically endorsing the exclusionary rule.<sup>129</sup>

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<sup>122</sup> 547 U.S. 586 (2006).

<sup>123</sup> *Id.* at 591.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 591–92. As Professors Kamin and Marceau pointed out, this statement is one of "Orwellian revisionist history." Kamin & Marceau, *supra* note 14, at 616 (pointing out the similarities in *Hudson's* accounting of the Court's approach to the exclusionary rule to George Orwell's commentary that "Oceania has always been at war with Eurasia").

<sup>126</sup> *Hudson*, 547 U.S. at 592; *id.* at 603–04 (Kennedy, J., concurring).

<sup>127</sup> *Hudson*, 547 U.S. at 592–94 (majority opinion); *id.* at 603–04 (Kennedy, J., concurring).

<sup>128</sup> See Albert W. Alschuler, *Herring v. United States, A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 482 (2009); Craig M. Bradley, *Is the Exclusionary Rule Dead?*, 102 J. CRIM. LAW & CRIMINOLOGY 1, 4–5 (2012).

<sup>129</sup> *Hudson*, 547 U.S. at 603 ("[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.").

The *Herring* decision signaled that *Hudson* was not so limited.<sup>130</sup> In *Herring*, the police officer had arrested the defendant based on inaccurate information from another police department that the defendant had an outstanding warrant.<sup>131</sup> Although the Court could have concluded that the police officer was acting based on a mistake of fact, and therefore there was no violation of the Fourth Amendment, the Court accepted that there was a violation of the Fourth Amendment and moved squarely to the question of whether the evidence found based on the unlawful arrest should be invalidated.<sup>132</sup> *Herring* reiterated *Hudson's* language cautioning against the use of the exclusionary rule and using the exclusionary rule only when the deterrent effect of excluding the evidence outweighed the social costs that result from the exclusion of evidence.<sup>133</sup> The Court then expanded this cost-benefit approach to equate the culpability of the police officer with the deterrent impact of the application of the exclusionary rule.<sup>134</sup> The *Herring* opinion drew support for this approach from language in *Leon* about the "flagrancy of the police misconduct."<sup>135</sup> However, in *Leon*, the Court was concerned with whether the officer was acting in an objectively reasonable manner.<sup>136</sup> By contrast, in *Herring*, the Court shifted its focus, explaining that "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."<sup>137</sup> Moreover, to answer what conduct might reach such a level, the

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<sup>130</sup> Whether *Herring* deserves the expansive reading described in this Article or has a more minimal impact as commentators, such as Professor Alschuler, had hoped, see Alschuler, *supra* note 128, at 511–13, many commentators have concluded that *Davis* clearly saw *Herring* as evincing a pronounced antipathy toward the exclusionary rule. See Maclin & Rader, *supra* note 14, at 1205–07; Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 WM. & MARY BILL RTS. J. 821, 830–32 (2013) [hereinafter Kinports, *Culpability*].

<sup>131</sup> *Herring v. United States*, 555 U.S. 135, 137–38 (2009).

<sup>132</sup> *Id.* at 138–39.

<sup>133</sup> *Id.* at 140.

<sup>134</sup> *Id.* at 143.

<sup>135</sup> *Id.* at 144 (quoting *United States v. Leon*, 468 U.S. 897, 911 (1984)).

<sup>136</sup> *Leon*, 468 U.S. at 919, 922–23.

<sup>137</sup> *Herring*, 555 U.S. at 144.



Court explained it was looking for “deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.”<sup>138</sup>

The Court returned to this heightened rhetoric two years later in *Davis v. United States*.<sup>139</sup> In *Davis*, the Court was faced with the question of how to handle a motion to suppress evidence when the search was lawful under binding precedent at the time of the search but was determined to be unconstitutional while the defendant’s case was on direct appeal.<sup>140</sup> As a general rule, defendants may take advantage of a change in the law while their case is pending, and that is precisely what happened to *Davis*.<sup>141</sup> Moreover, the Court recognized that as a consequence of this general rule of retroactivity, the search of *Davis* violated the Fourth Amendment; but, that did not mean that the evidence needed to be excluded.<sup>142</sup>

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<sup>138</sup> *Id.* At the same time, the Court insisted that the test remained an objective test in which the subjective intent of the official was irrelevant. *Id.* at 145. Commentators have questioned how to apply a test that calls for an evaluation of reckless conduct without any subjective inquiry. Ferguson, *supra* note 14, at 640–41; Alschuler, *supra* note 128, at 483–88; Kit Kinports, *Veteran Police Officers and Three-Dollar Steaks: The Subjective/Objective Dimensions of Probable Cause and Reasonable Suspicion*, 12 U. PA. J. CONST. L. 751, 752–53 (2010) [hereinafter Kinports, *Reasonable Suspicion*]. Moreover, as Justice Ginsburg pointed out in her *Herring* dissent, the assumption of the Court that the deterrence is not effective in cases where officers are negligent “runs counter to a foundational premise of tort law.” *Herring*, 555 U.S. at 153 (Ginsburg, J., dissenting). A number of commentators have agreed with this point. See Bradley, *supra* note 128, at 9; Kinports, *Culpability*, *supra* note 130, at 835–36. In fact, as Professors Kamin and Marceau recently wrote, “It seems almost unfair at this point to critique the logic of *Herring*—that negligent conduct cannot be deterred through sanctions.” Kamin & Marceau, *supra* note 14, at 617.

<sup>139</sup> 564 U.S. 229 (2011).

<sup>140</sup> *Id.* at 237.

<sup>141</sup> In *Davis*, the defendant’s car was searched based on the binding authority that permitted a search of the passenger compartment whenever a suspect was arrested in an automobile. In *Arizona v. Gant*, the Supreme Court held that if the suspect is restrained, the search is limited to evidence related the offense for which the suspect was arrested. 556 U.S. 332 (2009). The defendant’s case in *Davis* was on direct appeal when *Gant* was decided, and thus, under ordinary principles of retroactivity, the defendant was entitled to apply *Gant* to his search. *Davis*, 564 U.S. at 252–53 (Breyer, J., dissenting).

<sup>142</sup> While the Court acknowledged that the retroactivity principle required the conclusion that the search violated *Davis*’s Fourth Amendment rights, it concluded that the evidence should not be suppressed because the “[r]etroactive application does not . . . determine what ‘appropriate remedy’ (if any) the defendant should obtain.” *Davis*, 564 U.S. at 241–43 (majority opinion).

The *Davis* Court continued its singular focus on deterrence as the only justification for the exclusionary rule;<sup>143</sup> yet, it also cautioned that “[r]eal deterrent value is a ‘necessary condition for exclusion,’ but it is not ‘a sufficient’ one.”<sup>144</sup> Rather, because the Court saw the “heavy toll” that the exclusionary rule plays on “both the judicial system and society at large,” the Court instructed that the “deterrence benefits of suppression must outweigh its heavy costs.”<sup>145</sup> As it did in *Herring*, the *Davis* Court equated the deterrence value of suppression with the culpability of the police officer.<sup>146</sup> The Court explained: “[W]hen the police act with an objectively ‘reasonable good faith belief’ that their conduct is lawful, or when their conduct involves only simple, ‘isolated’ negligence, the ‘deterrence rationale loses much of its force,’ and exclusion cannot ‘pay its way.’”<sup>147</sup>

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<sup>143</sup> *Id.* at 236–237. Some members of the Court have refused to view the exclusionary rule as solely concerned about deterrence. As Justice Sotomayor recently wrote in her powerful dissent in *Utah v. Strieff*, the exclusionary rule not only deters police misconduct, “[i]t also keeps courts from being ‘made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.’” 136 S. Ct. 2056, 2065 (2016) (Sotomayor, J., dissenting) (quoting *Terry v. Ohio*, 392 U.S. 1, 13 (1968)). See *Herring v. United States*, 555 U.S. 135, 152 (2009) (Ginsburg, J., dissenting) (alteration in original) (quoting *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting) (explaining that the exclusionary rule “also serves other important purposes: It ‘enabl[es] the judiciary to avoid the taint of partnership in official lawlessness,’ and it ‘assur[es] the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government’ ”)).

<sup>144</sup> *Id.* at 237 (quoting *Hudson v. Michigan*, 547 U.S. 586, 596 (2006)). According to the *Davis* opinion, “Our cases hold that society must swallow this bitter pill when necessary, but only as a ‘last resort.’” *Id.* (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)). In the most recent Term, the Court reiterated its distaste for the exclusionary rule in a case involving the attenuation doctrine, a doctrine that permits fruits of unconstitutional police conduct to be admitted when the connection between the constitutional violation and the evidence is severed by an intervening event. *Strieff*, 136 S. Ct. at 2061. The majority began its discussion by quoting *Hudson*’s conclusion that “[s]uppression of evidence . . . has always been our last resort, not our first impulse.” *Id.* (quoting *Hudson*, 547 U.S. at 591).

<sup>145</sup> *Davis*, 564 U.S. at 237.

<sup>146</sup> *Id.* at 238 (explaining that the culpability required was “‘deliberate,’ ‘reckless,’ or ‘grossly negligent’ disregard for Fourth Amendment rights”) (quoting *Herring v. United States*, 555 U.S. 135, 144 (2009)).

<sup>147</sup> *Davis*, 564 U.S. at 238 (citations omitted).

#### 4. The Connection Between the Qualified Immunity Standard and the Good Faith Exception

In both the qualified immunity cases and the good faith exception cases, we see an escalation of rhetoric that favors the government as opposed to the victim of the constitutional violation. Both standards began as a reasonable, good faith belief standard, measured through an objective lens as to what a reasonable officer would conclude under the circumstances.<sup>148</sup> And, both standards began with placing the onus on the officer to ensure that the conduct was consistent with the commands of the Fourth Amendment. Just as the culpability required to defeat a claim of qualified immunity escalated to a showing that the official was “knowingly criminal or plainly incompetent,” the Court has announced that more than “simple, isolated negligence” must be found to exclude evidence—“deliberate, reckless, or grossly negligent conduct” is required, at least where the actors involved in the constitutional error are not the investigators themselves. Thus, both doctrines call for an objective evaluation of the facts, while simultaneously establishing a threshold of recklessness or worse, which typically involves an inquiry into a subjective state of mind.<sup>149</sup>

Whether the two doctrines are in fact the same has been the subject of debate.<sup>150</sup> While the two doctrines have developed largely independently of each other, both the qualified immunity doctrine and the good faith exception permit the government to violate the Fourth Amendment without providing the victim with a remedy. Both doctrines employ the similar language of “reasonable mistakes” and require a degree of culpability by law enforcement.<sup>151</sup> And, indeed, it is clear that the standards are

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<sup>148</sup> Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); United States v. Leon, 468 U.S. 897, 919 n.20 (1984).

<sup>149</sup> Laurin, *supra* note 70, at 727–28.

<sup>150</sup> In her article, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, Professor Laurin suggests that *Herring's* approach to the exclusionary rule can be best understood in terms of the development of the qualified immunity doctrine. *Id.* at 720. Professor John M. Greabe disagreed with Professor Laurin in his response to this article, and in particular, her assessment of the qualified immunity doctrine. See John M. Greabe, *Objecting at the Altar: Why the Herring Good Faith Principle and the Harlow Qualified Immunity Doctrine Should Not Be Married*, 112 COLUM. L. REV. SIDEBAR 1, 2–3 (2012).

<sup>151</sup> Although Professors Laurin and Greabe disagree about the contours of these two doctrines, they do agree that these doctrines share this common ground. Laurin, *supra* note 70, at 727–28; Greabe, *supra* note 150, at 5.

equivalents when the police conduct a search pursuant to a defective warrant.<sup>152</sup> Given the overlap between the two doctrines, it seems reasonable to conclude that the two standards are rough equivalents.<sup>153</sup> Whether this conclusion is accurate, however, is open to reconsideration in light of the Court’s 2014 decision in *Heien v. North Carolina*,<sup>154</sup> when the Court incorporated “objectively reasonable” mistakes of law into the concept of reasonableness under the Fourth Amendment.<sup>155</sup>

### C. *The Heien Decision*

Notwithstanding the substantial leeway the Supreme Court provided to officers under the reasonableness standard of the Fourth Amendment, the federal circuits—save the United States Court of Appeals for the Eighth Circuit—refused to find that arrests based on a mistaken understanding of substantive law were consistent with the commands of the Fourth Amendment. Rather, the majority of lower federal courts concluded that warrantless searches or seizures based on police mistakes regarding substantive law were “objectively unreasonable.”<sup>156</sup> In

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<sup>152</sup> Although Justice White indicated in *Leon* that there might be some differences between the two standards, *Leon*, 468 U.S. at 922 n.23, in *Malley v. Briggs* (a qualified immunity case), Justice White wrote: “[T]he same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon* defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest.” 475 U.S. 335, 344 (1986). And, the Court reiterated this position in both the *Groh v. Ramirez*, 540 U.S. 551, 563–65 (2004) and *Messerschmidt v. Millender* decisions. The *Messerschmidt* Court explained that “we have held that ‘the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon* defines the qualified immunity accorded an officer’ who obtained or relied on an allegedly invalid warrant.” *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1245 n.1 (2012) (citations omitted).

<sup>153</sup> Laurin, *supra* note 70, at 710–11; see Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1109 (2011) (alteration in original) (“As the Supreme Court has made clear, the traditional standard of the good faith exception evaluates the second question by using a familiar test from qualified immunity law. Where the good faith exception applies, it adopts ‘the same standard of objective reasonableness that . . . defines the qualified immunity accorded an officer’ in a civil case.”). But see Greabe, *supra* note 150, at 7–8 (objecting to Professor Laurin’s equation of the two doctrines as threatening to restrict the availability of remedies for constitutional torts).

<sup>154</sup> 135 S. Ct. 530 (2014).

<sup>155</sup> *Id.* at 538.

<sup>156</sup> *United States v. Nicholson*, 721 F.3d 1236, 1238 (10th Cir. 2013) (“Although an officer’s mistake of fact can still justify a probable cause or reasonable suspicion determination for a traffic stop, an officer’s mistake of law cannot.”); see *United*

addition, in these cases, the lower federal courts rejected the government's attempt to use the good faith exception to the exclusionary rule to allow the admission of the evidence.<sup>157</sup>

The lower federal courts rejected the government's attempt to extend the allowance for reasonable mistakes of fact to include reasonable mistakes of law on the grounds that law enforcement officials had the responsibility to know the law.<sup>158</sup> The courts reasoned that accepting substantive mistakes of law as consistent with Fourth Amendment requirements would remove incentives for police to make sure they understand the substantive law they are enforcing.<sup>159</sup> As the Fifth Circuit explained in one of the earliest decisions on this issue, the Supreme Court decisions gave officers "broad leeway to conduct searches and seizures . . . the flip side of that leeway is that the legal justification must be objectively grounded."<sup>160</sup> Moreover,

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States v. Miller, 146 F.3d 274, 279 (5th Cir. 1998) (noting that the Supreme Court "provides law enforcement officers broad leeway to conduct searches and seizures . . . [b]ut the flip side of that leeway is that the legal justification must be objectively grounded"); United States v. McDonald, 453 F.3d 958, 962 (7th Cir. 2006) ("A stop based on a subjective belief that a law has been broken, when no violation actually occurred, is not objectively reasonable"); United States v. Tibbetts, 396 F.3d 1132, 1138 (10th Cir. 2005) ("[F]ailure to understand the law by the very person charged with enforcing it is *not* objectively reasonable."); United States v. Chanthasouvat, 342 F.3d 1271, 1279 (11th Cir. 2003) ("[A] mistake of law cannot provide reasonable suspicion or probable cause to justify a traffic stop."); United States v. King, 244 F.3d 736, 739 (9th Cir. 2001) ("Even a good faith mistake of law by an officer cannot form the basis for reasonable suspicion."). *But see* United States v. Martin, 411 F.3d 998, 1001 (8th Cir. 2005) ("[T]he validity of a stop depends on whether the officer's actions were objectively reasonable in the circumstances, and in mistake cases the question is simply whether the mistake, whether of law or fact, was an objectively reasonable one."). Indeed, one of the foremost authorities on Fourth Amendment law, Professor Wayne LaFare, wrote in 2004 that "it is well-established Fourth Amendment doctrine that the sufficiency of the claimed probable cause must be determined by considering the conduct and circumstances deemed relevant within the context of the *actual* meaning of the applicable substantive provision, rather than the officer's claimed interpretation of that statute." LaFare, *supra* note 8, at 1847-48.

<sup>157</sup> *Chanthasouvat*, 342 F.3d at 1279-80; United States v. Lopez-Soto, 205 F.3d 1101, 1106 (9th Cir. 2000); United States v. Lopez-Valdez, 178 F.3d 282, 289 (5th Cir. 1999).

<sup>158</sup> *Nicholson*, 721 F.3d at 1242 ("[R]equiring law enforcement personnel to know the law they are asked to enforce comports with a basic policy of fairness"); United States v. Orduna-Martinez, 561 F.3d, 1134, 1137 n.2 (holding that "failure to understand the law by the very person charged with enforcing it is *not* objectively reasonable").

<sup>159</sup> *E.g.*, *Nicholson*, 721 F.3d at 1242; *Lopez-Soto*, 205 F.3d at 1106.

<sup>160</sup> United States v. Miller, 146 F.3d 274, 279 (5th Cir. 1998).

the courts concluded that extending the reasonable mistake line of cases to include mistakes of law would allow the government to use any vagueness in a statute against a defendant,<sup>161</sup> and it would also violate the trope that individuals are presumed to know the law.<sup>162</sup> In short, under the prevailing federal court analysis, where the facts viewed objectively did not violate any law, an arrest or stop was deemed unconstitutional and the evidence was suppressed.<sup>163</sup> As the Seventh Circuit succinctly stated, "[a] stop based on a subjective belief that a law has been broken, when no violation actually occurred, is not objectively reasonable."<sup>164</sup>

In *Heien*, the Supreme Court soundly rejected this approach and ruled 8–1 that just as a search or seizure is consistent with the Fourth Amendment's commands when the police are acting under a reasonable mistake of fact, the Fourth Amendment is not violated when the police are acting under a reasonable mistake about the scope of the substantive law.<sup>165</sup> In *Heien*, a police officer stopped a car because he believed that North Carolina law required two working brake lights, and once he stopped the car, he received consent to search the car and discovered a bag of cocaine.<sup>166</sup> The intermediate state court held that the initial stop was unlawful because the law only required one brake light to be working, and, therefore, the stop violated the Fourth Amendment.<sup>167</sup> The State appealed the lower court's ruling to its supreme court on the grounds that the police officer's mistake of

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<sup>161</sup> *Chanthasouxat*, 342 F.3d at 1278–79.

<sup>162</sup> *Nicholson*, 721 F.3d at 1242 ("If [a]s a rule . . . a defendant is presumed to know the law, we must expect as much from law enforcement.") (citing *Orduna-Martinez*, 561 F.3d at 1137 n.2).

<sup>163</sup> It should be noted that several states beyond North Carolina aligned themselves with the Eighth Circuit and concluded that mistakes of law could be reasonable. *State v. Wright*, 791 N.W.2d 791, 799 (S.D. 2010); *Andrews v. State*, 658 S.E.2d 126, 128–29 (Ga. Ct. App. 2008); *Moore v. State*, 986 So. 2d 928, 935 (Miss. 2008); *City of Wilmington v. Conner*, 761 N.E.2d 663, 667 (Ohio Ct. App. 2001). For a discussion of the approach of the Eighth Circuit and the state courts, see Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L.J. 69, 79–82 (2011).

<sup>164</sup> *United States v. McDonald*, 453 F.3d 958, 962 (7th Cir. 2006). As Professor Logan pointed out, this approach was consistent with the historical approach courts took when police officers made mistakes of law. At common law, if the police officer had no authority under the law for his actions, then the officer was a wrongdoer and subject to tort liability. Logan, *supra* note 163, at 78.

<sup>165</sup> *Heien v. North Carolina*, 135 S. Ct. 530, 534 (2014).

<sup>166</sup> *Id.*

<sup>167</sup> *State v. Heien*, 714 S.E.2d 827, 829–31 (N.C. Ct. App. 2011).

law was reasonable, and therefore, the stop complied with the demands of the Fourth Amendment.<sup>168</sup> The state court agreed, and the Supreme Court affirmed.<sup>169</sup>

Contrary to the majority of the federal circuits, the Court found no reason to distinguish between mistakes of fact and mistakes of substantive law. Rather, because the standard under the Fourth Amendment is reasonableness, and because reasonable individuals can make reasonable mistakes of law as well as mistakes of fact, the Court found no reason to make a distinction between the two types of mistakes.<sup>170</sup> In fact, the Court rejected the Defendant-Petitioner's argument that the question of whether a mistake of law should result in a suppression of the evidence is more appropriately considered in determining whether there is a remedy for the constitutional violation, not whether there is a constitutional violation.<sup>171</sup> Instead, the Court concluded that where the mistake of substantive law made by the officer is a reasonable one, there simply is no violation of the Fourth Amendment.<sup>172</sup> At the same time, the majority and the concurring opinion made clear that a mistaken judgment as to the reach of the Fourth Amendment itself—as opposed to substantive law—would not be consistent with the Constitution.<sup>173</sup>

In expanding the realm of mistakes permitted within the Fourth Amendment to include mistakes of substantive law, the Court expressly rejected the claim that this approach would encourage the “sloppy study of the laws” on the grounds that the mistakes that were acceptable under the Fourth Amendment were limited to those that were “*objectively* reasonable.”<sup>174</sup>

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<sup>168</sup> State v. Heien, 737 S.E.2d 351, 352 (N.C. 2012).

<sup>169</sup> *Heien* came to the Court in a curious posture because North Carolina does not recognize the good faith exception to the exclusionary rule. Heien v. North Carolina, 135 S. Ct. 530, 545 (Sotomayor, J., dissenting). Thus, the case squarely presented the issue to the Supreme Court of whether a mistake of law renders a search or seizure unreasonable for purposes of a Fourth Amendment violation.

<sup>170</sup> *Id.* at 536 (“Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law. There is no reason, under the text of the Fourth Amendment or our precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law.”).

<sup>171</sup> *Id.* at 538.

<sup>172</sup> *Id.* at 539–40.

<sup>173</sup> *Id.* at 539; *id.* at 541 n.1 (Kagan, J., concurring).

<sup>174</sup> *Id.* at 539–40 (majority opinion).

Moreover, both the majority and concurring opinions stressed that the Fourth Amendment’s tolerance of mistakes is not as great as it is in the context of the qualified immunity doctrine.<sup>175</sup> Writing for the majority, Chief Justice Roberts explained that the question of whether the officer’s mistake of law was objectively reasonable for purposes of the Fourth Amendment “is not as forgiving as the one employed in the distinct context of deciding whether an officer is entitled to qualified immunity for a constitutional or statutory violation.”<sup>176</sup> And, Justice Kagan wrote separately to emphasize the distinction between mistakes of law consistent with the Fourth Amendment and the standard for liability under qualified immunity. As she explained, “Our modern qualified immunity doctrine protects ‘all but the plainly incompetent or those who knowingly violate the law,’ ”<sup>177</sup> while an officer will be acting in accordance with the Fourth Amendment only when a “statute is genuinely ambiguous.”<sup>178</sup> Moreover, Justice Kagan cited as support for this understanding the government’s position in *Heien*, that situations in which there would be a reasonable mistake of law for purposes of the Fourth Amendment would be “exceedingly rare.”<sup>179</sup>

*Heien* thus allows police officers to act under a mistaken understanding of the law in their jurisdiction and yet not violate the Fourth Amendment. At the same time, it is clear that the eight members of the Court who accepted this conclusion also believed that tolerance under the Fourth Amendment for mistakes of law is less forgiving towards mistaken judgments than is the standard for qualified immunity.<sup>180</sup> Thus, after *Heien*, we know that what is considered an “objectively reasonable mistake” for purposes of the merits of a Fourth Amendment claim does not provide police officers with the leeway provided under the qualified immunity doctrine. In short, there can be an unreasonable mistake of law that will invalidate a stop or search, but not necessarily result in liability for the officer in a § 1983

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<sup>175</sup> *Id.* at 540–41 (Kagan, J., concurring).

<sup>176</sup> *Id.* at 539 (majority opinion).

<sup>177</sup> *Id.* at 541 (Kagan, J., concurring) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011)).

<sup>178</sup> *Id.* at 541 (“If the statute is genuinely ambiguous, such that overturning the officer’s judgment requires hard interpretive work, then the officer has made a reasonable mistake. But if not, not.”).

<sup>179</sup> *Id.* at 541.

<sup>180</sup> *Id.* at 539 (majority opinion); *id.* at 540–42 (Kagan, J., concurring).



action. But, what is not clear after the decision is what constitutes an objectively reasonable mistake of law for purposes of the Fourth Amendment and how that understanding should relate to any conclusion with respect to the good faith exception to the exclusionary rule.<sup>181</sup> It is to those questions that this Article now turns.

## II. INTERPRETING THE *HEIEN* DECISION

The *Heien* decision appears to be a very straightforward decision. Chief Justice Roberts adopted the following logic in reaching the conclusion that reasonable suspicion can be based on the mistaken apprehension of the scope of the substantive law: (1) the standard for evaluating law enforcement's conduct under the Fourth Amendment is "reasonableness"; (2) "[t]o be reasonable is not to be perfect," and thus searches based on mistakes of fact can be reasonable; (3) reasonable police officers can make reasonable mistakes of law as well as reasonable mistakes of fact; and (4) therefore, there is no reason to make a distinction between a mistake in fact and a mistake about the scope of a legal prohibition.<sup>182</sup> Even assuming that this approach makes sense,<sup>183</sup> the decision raises two significant questions. First, it is unclear what should count as a "reasonable mistake" for purposes of a substantive Fourth Amendment claim. Second, in using the same "objectively reasonable" language that the courts also employ when discussing both the good faith exception and the qualified immunity standard, the decision blurs the reach of the Fourth Amendment with the reach of these two remedial doctrines.<sup>184</sup>

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<sup>181</sup> *Id.* at 547 (Sotomayor, J., dissenting) (expressing concern that "the difference between qualified immunity's reasonableness standard—which the Court insists without elaboration does not apply here—and the Court's conception of reasonableness in this context—which remains undefined—will prove murky in application").

<sup>182</sup> *Id.* at 536 (majority opinion).

<sup>183</sup> See Logan, *supra* note 163, at 90–109 (arguing persuasively against permitting errors of law to be consistent with the Fourth Amendment); LaFave, *supra* note 8, at 1847–48 ("[I]t is well-established Fourth Amendment doctrine that the sufficiency of the claimed probable cause must be determined by considering the conduct and circumstances deemed relevant within the context of the actual meaning of the applicable substantive provision, rather than the officer's claimed interpretation of that statute.").

<sup>184</sup> *Heien*, 135 S. Ct. at 547 (Sotomayor, J., dissenting) ("It seems to me that the difference between qualified immunity's reasonableness standard—which the Court

A. *What Is an Objectively Reasonable Mistake of Law?*

In *Heien*, the majority gave only broad guidance as to how the lower courts should evaluate whether a mistake of law was “reasonable.” Writing for the majority, the Chief Justice simply noted that the mistake must be “objectively reasonable,” that the courts should not consider the subjective understanding of the officer, and that the Fourth Amendment inquiry was not as forgiving as the qualified immunity inquiry.<sup>185</sup> The concurrence written by Justice Kagan contains a bit more guidance, stating that a reasonable mistake of law is only one in which “the statute is genuinely ambiguous, such that overturning the officer’s judgment requires hard interpretive work.”<sup>186</sup> Justice Kagan also wrote that she expected that such cases will be “exceedingly rare.”<sup>187</sup> However, the lower court decisions rendered since *Heien* appear to support Justice Sotomayor’s concern that the decision did not provide sufficient guidance as to what was a reasonable mistake of law.<sup>188</sup> Indeed, in the twelve months after *Heien*, the lower courts have issued conflicting opinions on what constitutes a reasonable mistake of law, with many decisions providing the police with a great deal of leeway in making mistakes in reading of state substantive law.

The *Heien* Court had little problem concluding that the mistake of law made by the officer—stopping a car for only having one working brake light—was a reasonable one. The appellate court in North Carolina had concluded that this stop was invalid because a North Carolina statute referring to a “stop lamp” meant that only one working brake light was required.<sup>189</sup> However, another provision of the statute required that vehicles have “all originally equipped rear lamps or the equivalent in good

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insists without elaboration does not apply here—and the Court’s conception of reasonableness in this context—which remains undefined—will prove murky in application.”).

<sup>185</sup> *Id.* at 539 (majority opinion).

<sup>186</sup> *Id.* at 541 (Kagan, J., concurring).

<sup>187</sup> *Id.*

<sup>188</sup> *Heien*, 135 S. Ct. at 547 (Sotomayor, J., dissenting) (“I fear the Court’s unwillingness to sketch a fuller view of what makes a mistake of law reasonable only presages the likely difficulty that courts will have applying the Court’s decision in this case.”).

<sup>189</sup> *State v. Heien*, 714 S.E.2d 827, 829–31 (N.C. Ct. App. 2011). The North Carolina Supreme Court accepted this reading of the law. *State v. Heien*, 737 S.E.2d 351, 354 (N.C. 2012).

working order.”<sup>190</sup> In addition, there were no state court decisions interpreting the stop-lamp provision, and both the majority and dissent in the North Carolina Supreme Court decision acknowledged that it would have been reasonable to conclude that the law required vehicles to have two working brake lights.<sup>191</sup> Thus, given the conflict in the wording of the statutory provisions and the lack of precedent, the United States Supreme Court quickly concluded it was “objectively reasonable” for the officer to believe two brake lights were required.<sup>192</sup>

Some of the decisions that have been rendered since *Heien* appear to take the admonition that the mistake must be “objectively reasonable” as a real restriction on law enforcement. For example, in *United States v. Alvarado-Zarza*,<sup>193</sup> the Fifth Circuit concluded that the arresting officer committed an unreasonable mistake of law, and thus violated the Fourth Amendment in stopping a vehicle for failure to use a signal to change lanes when the Texas statute required signals only when making a left or right turn.<sup>194</sup> The Fifth Circuit rested this conclusion both on the plain language of the statute and the case law that predated the stop, which drew a distinction between turns and lane changes.<sup>195</sup> Similarly, the Seventh Circuit found a stop unreasonable when the police officer claimed he believed that the use of a commercially sold license plate frame violated a state statute requiring license plates to be clearly legible.<sup>196</sup> Finally, two federal district courts have held that stops were not

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<sup>190</sup> *Heien*, 135 S. Ct. at 540 (quoting N.C. GEN. STAT. ANN. § 20-129(d) (West 2015)).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> 782 F.3d 246 (5th Cir. 2015).

<sup>194</sup> *Id.* at 251.

<sup>195</sup> *Id.* at 250. See generally *People v. Jones*, B255728, 2015 WL 1873269 (Cal. Ct. App. April 23, 2015) (stopping individual for walking in the middle of the road in a residential area not reasonable mistake when both statutory language and precedent make clear that statutory prohibition applied in commercial areas, not residential ones); *State v. Brown*, 870 N.W.2d 687 (Iowa Ct. App. 2015) (finding that the police error of arresting someone who had an open container in a car in a private parking lot was not reasonable because both the statute and case law established the open container law applied only to cars on public streets or highways); *State v. Scriven*, No. A-5680-13T3, 2015 WL 773824 (N.J. Super. Ct. App. Div. Jan. 12, 2015) (stopping vehicle for having high beams on was an unreasonable mistake when plain language of statute required dimming of high beams only when facing oncoming traffic and officer who stopped driver was in a parked vehicle).

<sup>196</sup> *United States v. Flores*, 798 F.3d 645, 649–50 (7th Cir. 2015).

reasonable mistakes of law under *Heien* when the officers based the stops on the individuals having air fresheners hanging from their rearview mirrors and claimed that those air fresheners could be violations of ordinances preventing windshields being obstructed.<sup>197</sup>

Yet, other decisions have provided officers with considerably more leeway to misunderstand the law and remain compliant with the commands of the Fourth Amendment. Several courts have read *Heien* as instructing the courts to read any ambiguities in a statute as favoring the government.<sup>198</sup> Indeed, one court stated that it was “skeptical” that the officer’s reading of the statute was correct, but nonetheless concluded that under *Heien* the officer’s mistake was reasonable, and, hence, there was no Fourth Amendment violation in stopping the vehicle.<sup>199</sup>

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<sup>197</sup> *United States v. Black*, 104 F. Supp. 3d 997 (W.D. Mo. 2015); *United States v. Sanders*, 95 F. Supp. 3d 1274 (D. Nev. 2015). A number of state courts have also required the State to bear the burden of showing that the mistake was objectively reasonable. *See Darringer v. State*, 46 N.E.3d 464 (Ind. Ct. App. 2015) (when the legislature had changed statute a year earlier, the police officer’s lack of knowledge of the change was not objectively reasonable); *State v. Nelson*, 356 P.3d 1113 (Okla. Crim. App. 2015) (concluding that the State failed to present evidence that the mistake of law was reasonable); *State v. Lerdahl*, No. 2014AP2119–CR, 2015 WL 4619946, at \*3 (Wis. Ct. App. Aug. 4, 2015) (relying on Justice Kagan’s language that “objectively reasonable mistakes of law are ‘exceedingly rare’” and concluded the mistake was unreasonable); *Brown*, 870 N.W.2d 687 (finding that the police error is arresting someone who had an open container in a car in a private parking lot was not reasonable because both the statute and case law established the open container law applied only to cars on public streets or highways); *Jones*, 2015 WL 1873269 (stopping an individual for walking in the middle of the road in a residential area was not a reasonable mistake when both statutory language and precedent make clear that the statutory prohibition applied in commercial areas, not residential ones); *State v. Tercero*, 467 S.W.3d 1 (Tex. Ct. App. 2015) (reading the statute to permit the warrantless withdrawal of blood was not reasonable).

<sup>198</sup> *United States v. Flaven*, No. 3:13–cr–00104–RCJ–VPC, 2015 WL 2219779, at \*2 (D. Nev. May 12, 2015) (“Although the ambiguity in the statute might favor Defendant in the context of a citation for an illegal lane change due to the rule of lenity, the ambiguity favors the Government in the context of a Fourth Amendment challenge.”); *United States v. Stanbridge*, 3:14–cr–30020, 2015 WL 682779, at \*4 (C.D. Ill. Feb. 18, 2015) (concluding that the ambiguity in the reading of the statute “must be resolved in the Government’s favor”); *Williams v. State*, 28 N.E.3d 293, 295 (Ind. Ct. App. 2015) (finding mistake of law a reasonable one when “[a] reasonable person unversed in statutory interpretation” would likely read statute as officer did); *State v. Wilson*, No. 111263, 2015 WL 326662, at \*4 (Kan. Ct. App. Jan. 16, 2015) (finding mistake of law reasonable even though as dissent points out, the statute permitted the defendant’s conduct).

<sup>199</sup> *United States v. Morales*, 115 F. Supp. 3d 1291, 1295 (D. Kan. 2015); *see also United States v. Henry*, CRIMINAL NO. 15-26-JWD-SCR, 2015 WL 6479029, at \*3

Moreover, even where courts have concluded that the plain language of the statute required the conclusion that the defendant did not violate the law, they have been willing to conclude that the mistake was nonetheless an “objectively reasonable” mistake.<sup>200</sup>

Perhaps most disconcerting are decisions finding no Fourth Amendment violation when officers justify the stop by pointing to alleged violations of traffic laws when the defendant is using items in the manner that the general public does. For example, contrary to the conclusions of two federal district courts,<sup>201</sup> the Wisconsin Supreme Court recently concluded that the Fourth Amendment was not violated when an officer stopped a vehicle because it had an air freshener hanging from its rearview mirror.<sup>202</sup> The Wisconsin court, citing the “tremendous number” of statutory provisions governing roadway safety, concluded that the officer’s understanding that a hanging air freshener could violate the State’s unobstructed windshield requirement was an “objectively reasonable mistake of law.”<sup>203</sup> And, it reached this conclusion even though it recognized that under the construction of the statute that the State was proffering, the statute would also ban oil change stickers, rosaries, and even rearview mirrors.<sup>204</sup> Other state courts have also found that stops based on air fresheners and parking tags hanging from rear-view mirrors were reasonable mistakes under *Heien* because an officer could believe these hanging items violated the unobstructed windshield requirement.<sup>205</sup> Indeed, in one case from New York,

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(M.D. La. Oct. 27, 2015) (finding no Fourth Amendment violation when police impression was not false and unreasonable).

<sup>200</sup> *People v. Campuzano*, 188 Cal. Rptr. 3d 587, 591–92 (Cal. App. Dep’t Super. Ct. 2015) (concluding both that the ordinance is “clear and unambiguous” and that the mistake of law was “objectively reasonable”); *State v. Hurley*, 117 A.3d 433, 441 (Vt. 2015) (even though plain language supports the conclusion that there was no violation, mistake by officer is reasonable); *Williams*, 28 N.E.3d at 295 (concluding that although the language of the statute supported the defendant, the officer’s mistake was reasonable because a “reasonable person unversed in statutory interpretation would very likely read” the section as the officer did).

<sup>201</sup> *Black*, 104 F. Supp. 3d at 1004–05; *Sanders*, 95 F. Supp. 3d at 1286.

<sup>202</sup> *State v. Houghton*, 868 N.W.2d 143, 160 (Wis. 2015).

<sup>203</sup> *Id.* at 155.

<sup>204</sup> *Id.* at 156.

<sup>205</sup> *See Mason v. Commonwealth*, 767 S.E.2d 726 (Va. Ct. App. 2015) (finding stop based on parking tag objectively reasonable); *see also Hurley*, 117 A.3d 433 (finding stop based on air freshener was reasonable mistake of law); *People v.*

the court found the stop to be a reasonable mistake under *Heien* even though, as the dissent pointed out, the police permitted the defendant's girlfriend to drive away from the police precinct with the object dangling from the rearview mirror.<sup>206</sup>

Some courts have applied a similarly forgiving approach with respect to stops based on statutes requiring license plates to be visible.<sup>207</sup> For example, the Illinois Supreme Court concluded that a traffic stop based on a concern that a trailer hitch violated a statute involving the visibility of a license plate because the officer's mistake of law was objectively reasonable.<sup>208</sup> As in the Wisconsin case, the Illinois Supreme Court recognized that adopting the officer's view of the law would make "a substantial amount of otherwise lawful conduct illegal," including not only the use of trailer hitches, but also wheelchair and scooter carriers relied upon by those who are physically disabled.<sup>209</sup> Nonetheless, because there was no prior case law addressing the use of trailer hitches, the Illinois court concluded that the officer's actions were based on an objectively reasonable mistake of law.<sup>210</sup>

Many decisions issued after *Heien* thus show an increased tolerance of police stops of individuals based on asserted mistaken views of the law. What was presented to the Supreme Court as an allowance for misunderstandings in those "exceedingly rare" cases where there is a "'counterintuitive and confusing' law,"<sup>211</sup> has become in the view of many courts an

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Bookman, 131 A.D.3d 1258 (N.Y. App. Div. 2015) (same); Freeman v. Commonwealth, 778 S.E.2d 519 (Va. Ct. App. 2015) (same).

<sup>206</sup> *Bookman*, 131 A.D.3d at 1262 (Austin, J., dissenting).

<sup>207</sup> See United States v. Henry, CRIMINAL NO. 15-26-JWD-SCR, 2015 WL 6479029, at \*3 (M.D. La. Oct. 27, 2015); McCabe v. Gonzales, No. 1:13-cv-00435-CWD, 2015 WL 5679735, at \*1 (D. Idaho Sept. 25, 2015); United States v. McCullough, Criminal No. 3:15cr115-MHT (WO), 2015 WL 5013910, at \*5 (M.D. Ala. Aug. 17, 2015); People v. Gaytan, 32 N.E.3d 641, 653-54 (Ill. 2015); see also State v. Crudo, No. 112,805, 2015 WL 7162274, at \*13 (Kan. Ct. App. Nov. 13, 2015) (rejecting the defendant's claim that the license plate light was installed by the manufacturer and therefore could not reasonably be a statutory violation). The Kansas court went so far as to call the fact that the equipment was installed by the vehicle manufacturer "irrelevant" and reversed the trial court's suppression order with instructions that a new judge be appointed to hear the defendant's motion on remand. *Id.*

<sup>208</sup> *Gaytan*, 32 N.E.3d at 651.

<sup>209</sup> *Id.* at 650.

<sup>210</sup> *Id.* at 652-53.

<sup>211</sup> Brief for Respondent, *Heien v. North Carolina*, 135 S. Ct. 530 (2014) (No. 13-604), 2014 WL 3660500, at \*17; Transcript of Oral Argument at 48, *Heien v. North Carolina*, 135 S. Ct. 530 (2014) (No. 13-604) (agreeing that to constitute an excuse

excuse that allows for any alleged ambiguity to be read in favor of the police officer's actions. This approach reflects a misunderstanding of what *Heien* meant in concluding that a reasonable mistake of law could form the basis of a permissible seizure under the Fourth Amendment. Indeed, the lenient approach ignores the distinction that the Court drew in *Heien* between the margin of error it was permitting police officers under the Fourth Amendment and the margin of error permitted in qualified immunity cases.<sup>212</sup> The qualified immunity standard "gives government officials breathing room to make reasonable but mistaken judgments" by requiring the plaintiff to show that the asserted right was "sufficiently definite that any reasonable official . . . would have understood that he was violating it."<sup>213</sup> By permitting the State to justify a seizure under the Fourth Amendment by raising any statutory construction argument in favor of the officer's alleged view of the law, even when "skeptical" of the government's argument, these courts are essentially applying the same lenient standard given to officials in qualified immunity cases to the substantive Fourth Amendment question.

But, more problematic, giving such leniency for any asserted understanding of the law is contrary to the substantive commands of the Fourth Amendment. As the Court reminded us in June 2015, warrantless searches "are *per se unreasonable* . . . subject only to a few specifically established and well-delineated exceptions."<sup>214</sup> Thus, it is the government's burden to justify any warrantless action. Yet, the Court has also given the police great latitude in stopping individuals and

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based on a reasonable mistake of law, it must be "exceedingly rare," "objective," and "a reasonable lawyer would think that the policeman was right on the law, and only if after . . . a careful scrutiny and serious difficulty in construing the law, does it turn out that he is wrong").

<sup>212</sup> Admittedly, the distinction between the two doctrines that the Court relied on is less than clear, as Justice Sotomayor pointed out in her dissent. *Heien*, 135 S. Ct. at 547 (noting that "the difference between qualified immunity's reasonableness standard—which the Court insists without elaboration does not apply here—and the Court's conception of reasonableness in this context—which remains undefined—will prove murky in application."). But, taking the Court at its word, it clearly intended a more stringent test for mistakes of law and substantive Fourth Amendment claims as required in the qualified immunity context.

<sup>213</sup> *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

<sup>214</sup> *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2452 (2015) (alteration in original) (quoting *Arizona v. Gant*, 556 U.S. 332, 338 (2009)).

vehicles without warrants.<sup>215</sup> Given the significant degree of latitude these rulings provide to law enforcement,<sup>216</sup> the suggestion of some courts that any asserted ambiguity in the law be read to provide a constitutional basis for a seizure should be rejected as shifting the traditional burden in Fourth Amendment cases from the government to the defendant.

Bear in mind that a police officer’s subjective misunderstanding of the law will not affect the constitutionality of a seizure as long as a review of the facts available to the officer establishes a basis for a finding of some violation of the law.<sup>217</sup> Moreover, as long as there is an objectively reasonable belief that some offense was committed, it does not matter that the officer was using the alleged offense as a pretext for pursuing a hunch,<sup>218</sup> that the officer arrested and jailed an individual for a minor offense that is only punishable by fine,<sup>219</sup> or that state law prohibited an arrest for the crime,<sup>220</sup> as long as the officers had probable cause to believe the offense was committed. Thus, in the cases involving air fresheners, trailer hitches, and the like,

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<sup>215</sup> See *supra* text accompanying notes 45–54; see also *Utah v. Strieff*, 136 S. Ct. 2056, 2069–70 (2016) (Sotomayor, J., dissenting) (“This Court has allowed an officer to stop you for whatever reason he wants—so long as he can point to a pretextual justification after the fact.”).

<sup>216</sup> Granting this much latitude to police officers in making routine traffic stops has certainly been criticized. As Professor LaFave lamented in his article on traffic stops, the Court’s approach allows “prohibited drug stops to be sanitized by calling them traffic stops.” LaFave, *supra* note 8, at 1904. Moreover, in the words of Professor Stephen A. Saltzburg, the approach teaches law enforcement that “it can escape the Fourth Amendment’s restrictions if it offers phony explanations for actions.” Stephen Saltzburg, *The Supreme Court, Criminal Procedure and Judicial Integrity*, 40 AM. CRIM. L. REV. 133, 134 (2003).

<sup>217</sup> *Devenpeck v. Alford*, 543 U.S. 146, 153–54 (2004); see *Strieff*, 136 S. Ct. at 2069 (Sotomayor, J., dissenting) (“The officer does not even need to know which law you might have broken so long as he can later point to any possible infraction—even one that is minor, unrelated, or ambiguous.”).

<sup>218</sup> *Whren v. United States*, 517 U.S. 806, 813 (1996).

<sup>219</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318, 353 (2001). In fact, in the case, the Court even recognized that the “physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment.” *Id.* at 346–47. Nonetheless, the Court concluded that the larger societal interest in workable Fourth Amendment rules precluded a finding of a violation of the Fourth Amendment when the police had probable cause for the arrest. *Id.* at 347–53.

<sup>220</sup> *Virginia v. Moore*, 553 U.S. 164, 176 (2008) (“We conclude that warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution, and that while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment’s protections.”).



the only possible basis for the stop was the officer's asserted mistake about the substantive law's requirements. And, where the basis for the stop is the use of an item in the manner intended, the most reasonable conclusion is that the officer is asserting an understanding of the law that is not reasonable and that is likely a pretext for an investigation of suspected criminal activity.<sup>221</sup> While the Court may have excluded the possibility of a pretext claim when there is a violation of substantive law in *Whren*,<sup>222</sup> and *Heien* now permits police to seize individuals when the substantive law does not prescribe the activity,<sup>223</sup> *Heien* should not be read to tolerate ignorance, or worse, on the part of police officers in complying with the commands of the Fourth Amendment.

In short, *Heien* should not be a license for police to avoid their basic responsibility to ascertain what the law actually is before seizing persons. Every day we subject ourselves to the possibility of a traffic stop when we get into our cars.<sup>224</sup> Indeed, the sheer volume of traffic laws—and the de minimis nature of most of the violations and consequences of violations—ensures that many, if not all of us, may violate traffic laws on a regular basis.<sup>225</sup> As the Seventh Circuit recently stated, “A suspicion so broad that would permit the police to stop a substantial portion of the lawfully driving public . . . is not reasonable.”<sup>226</sup>

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<sup>221</sup> See *United States v. Sanders*, 95 F. Supp. 3d 1274 (D. Nev. 2015); *United States v. Black*, 104 F. Supp. 3d 997, 1000 (W.D. Mo. 2015).

<sup>222</sup> *Whren*, 517 U.S. at 815–16.

<sup>223</sup> *Heien v. North Carolina*, 135 S. Ct. 530, 540 (2014).

<sup>224</sup> As the dissent in *Mason v. Commonwealth* stated, “Every day, millions are stopped for one of the myriad of regulations governing our use of public streets. As soon as you get into your car, even before you turn the ignition key, you have subjected yourself to intense police scrutiny.” 767 S.E.2d 726, 735 (Va. Ct. App. 2015) (Humphreys, J., dissenting).

<sup>225</sup> Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1514 (2007); LaFave, *supra* note 8, at 1853. As Justice Sotomayor noted in her dissent in *Heien*, these stops “can be ‘annoying, frightening, and perhaps humiliating.’” *Heien*, 135 S. Ct. at 543 (Sotomayor, J., dissenting) (quoting *Terry v. Ohio*, 392 U.S. 1, 25 (1968)); see *Utah v. Strieff*, 136 S. Ct. 2056, 2069–70 (2016) (Sotomayor, J., dissenting) (“Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more. . . . As onlookers pass by, the officer may ‘feel with sensitive fingers every portion of [your] body. A thorough search [may] be made of [your] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.’” (quoting *Terry*, 392 U.S. at 17, n.13)).

<sup>226</sup> *United States v. Flores*, 798 F.3d 645, 649 (7th Cir. 2015).

Professor Forde-Mazrui has argued that unfettered police discretion is inconsistent with our acceptance of the rule of law and our rejection of a police state in which law enforcement has the authority to peremptorily search and seize individuals without cause.<sup>227</sup> Our commitment to the rule of law not only limits the exercise of police powers to conduct the legislature has defined as criminal in nature, but also provides the public with fair warning of the type of conduct that can result in interactions with the police.<sup>228</sup> Moreover, numerous studies have shown that members of minority groups are disproportionately more likely to be stopped by police officers than are white drivers.<sup>229</sup> If *Heien* is

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<sup>227</sup> Forde-Mazrui, *supra* note 225, at 1500.

<sup>228</sup> *Id.* at 1506–07. Moreover, individuals are more likely to attempt to obey the law and accept the consequences of failure to obey the law when they perceive the police as exercising their authority fairly and legitimately. See Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 344–45 (2011) (explaining that empirical research demonstrates that when individuals perceive authorities as acting fairly, they will accept that the actions were legitimate and therefore tailor their conduct to comply with the law).

<sup>229</sup> See Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 25, 2015), <http://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html>; Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1047 (2010); Forde-Mazrui, *supra* note 225, at 1511–15; R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 575–76 (2003) (citing studies of the incidence of racial profiling by law enforcement); I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 60–61 (2009) (providing examples of black individuals being stopped repeatedly when in predominantly white neighborhoods). As Professor Capers pointed out, although the *Terry* decision permitted police to proactively prevent crime, in most cases, the police’s suspicions are disproven. *Id.* at 62–63. Moreover, *Terry* stops—at least in New York City, which keeps statistics on these stops—disproportionately affect those who are black or Hispanic. *Id.* at 63. In fact, in January 2014, New York City settled a class action lawsuit filed in January 2008 challenging the stop and frisk policies and practices of the police department on the grounds that the police were engaged in unconstitutional racial profiling in carrying out the policies. Benjamin Weiser & Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. TIMES (Jan. 30, 2014), <http://www.nytimes.com/2014/01/31/nyregion/de-blasio-stop-and-frisk.html>. In 2012, a federal district court ruled that the tactics of the New York Police Department were unconstitutional. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 667 (S.D.N.Y. 2013). The injunction the court ordered, however, was stayed by the Second Circuit, and the appellate court ordered that the case be assigned to a different district court judge for further proceedings. *Ligon v. City of New York*, 736 F.3d 118, 129 (2d Cir. 2013). This decision in turn was partially vacated at the request of the City to allow remand to explore a settlement. *Ligon v. City of New York*, 743 F.3d 362, 365 (2d Cir. 2014).

read as permitting police conduct based on purported ambiguities in the statute without an examination of the reasonableness of that asserted ambiguity, the decision threatens to exacerbate this problem.<sup>230</sup> Thus, limiting *Heien* to the “exceedingly rare case” where a statute is “genuinely ambiguous” is not only necessary to prevent the “sloppy study of law,” it is necessary to discourage the abuse of law enforcement powers.<sup>231</sup> At a minimum, courts should respect the general rule that the government bears the burden of justifying any warrantless search by proving that the statute is genuinely ambiguous. In short, the government should be required to show that, in the words of the government advocate during the *Heien* oral

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<sup>230</sup> As Justice Sotomayor pointed out in her *Heien* dissent, the Supreme Court’s approach threatens to “significantly expand” the authority that the police already have in stopping individuals. *Heien v. North Carolina* 135 S. Ct. 530, 543 (2014) (Sotomayor, J., dissenting).

<sup>231</sup> Of course, as Professor Harmon points out, there are limits to the regulation of police behavior through constitutional litigation. First, the exclusionary rule sets a floor on police behavior; that is, it says what police may not do, rather than what police should do. Harmon, *supra* note 60, at 776–78. Thus, even constitutionally permissible activity, such as a lawful stop, may result in substantial and perhaps undesirable harm to an individual. *Id.* at 778. In *Atwater v. City of Lago Vista*, the Court acknowledged as much. 532 U.S. 318, 346–47 (2001). In that case, the police officer arrested a mother in front of her children for failure to wear a seatbelt, and the Court acknowledged that “the physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment.” *Id.* at 346–47. Nonetheless, the Court rejected her claim that the arrest was unreasonable because of the larger societal interests in having “readily administrable rules.” *Id.* at 347. Second, the Court renders its decisions, as Professor Harmon also points out, with at best limited empirical data on the actual effects of the rulings on police behavior. Harmon, *supra* note 60, at 772–76. Consequently, the Court makes normative judgments without an understanding of the context of the issues or the consequences of the decisions. *Id.* Indeed, one can see this in the *Atwater* Court’s rejection of the claim that a decision in favor of law enforcement in that case could result in increased police activity—and potential abuse—because such a claim was as simply “speculative.” *Atwater*, 532 U.S. at 353 n.25 (“Noticeably absent from the parade of horrors is any indication that the ‘potential for abuse’ has ever ripened into a reality.”). However, as Professor LaFave pointed out, once the police began using the traffic code as part of the war on drugs, police began making stops for insignificant traffic violations that were routinely upheld by the Court. LaFave, *supra* note 8, at 1847. Thus, it is difficult to have a great deal of confidence in the *Atwater* Court’s assertion that “just as surely the country is not confronting anything like an epidemic of unnecessary minor-offense arrests.” 532 U.S. at 353. Thus, while Professor Harmon is correct in pointing out the limits of constitutional remedies in controlling police behavior, that is a reason to explore other means of addressing the appropriate regulation of police activity—as she suggests in her article—and not a reason to remove the floor of the Constitution.

argument, “a reasonable lawyer would think that the policeman was right on the law.”<sup>232</sup> And, where that is not true, the officer’s conduct should be found to be unreasonable and in violation of the commands of the Fourth Amendment.

*B. Unreasonable Mistakes of Law and the Good Faith Exception*

Not only does the *Heien* decision fail to give the lower courts significant guidance on what is a “reasonable mistake of law” for purposes of evaluating the substance of a Fourth Amendment claim, but the distinction the majority opinion and the concurrence drew between “reasonable mistakes of law” for purposes of the Fourth Amendment and mistakes tolerated by the qualified immunity doctrines leads one to question what the relationship is between reasonable mistakes of law and the good faith exception. As noted above, eight members of the Court accepted the proposition that a mistake could be unreasonable for purposes of a Fourth Amendment claim without being unreasonable for purposes of a qualified immunity defense.<sup>233</sup> And as was discussed earlier,<sup>234</sup> there is an overlap with respect to qualified immunity and the good faith exception. Yet, the *Heien* decision is silent on the question of whether the good faith exception should be available to the government if there is an unreasonable mistake of law for purposes of the Fourth Amendment.

The failure of the Court to address the relationship between its decision and the good faith exception is particularly confusing in light of the arguments put forth in the case. The Petitioner argued, as did Justice Sotomayor’s dissent, that mistakes of law should be considered within the context of the good faith exception rather than in the context of whether there is a

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<sup>232</sup> Transcript of Oral Argument at 48, *Heien v. North Carolina*, 135 S. Ct. 350 (2014) (No. 13-604). Of course, it is possible that this approach could also encourage the legislature to deliberately write more ambiguous laws so as to allow the police and prosecutors to argue that the mistake was a reasonable one or that at a minimum, it was not so unreasonable as to require suppression. Professor Logan made a similar argument in his article, suggesting that allowing mistakes of law to satisfy the reasonable suspicion or probable cause standards would encourage textual imprecision. Logan, *supra* note 163, at 101. However, this is a consequence the Court has apparently accepted with its *Heien* decision. Moreover, the legislature remains incentivized—at least in theory—to write its laws with some precision to avoid vagueness challenges.

<sup>233</sup> *Heien*, 135 S. Ct. at 539; *id.* at 540–42 (Kagan, J., concurring).

<sup>234</sup> See *supra* note 153 and accompanying text.

violation of the Fourth Amendment.<sup>235</sup> The majority opinion responded to this argument in two ways. First, it excluded mistakes regarding the reach of the Fourth Amendment from the types of mistakes that can be consistent with the Fourth Amendment.<sup>236</sup> Second, the Court explained that in prior cases dealing with mistakes of law, the Court had looked to the good faith exception because in those cases the Court had either found or assumed a Fourth Amendment violation.<sup>237</sup> In contrast, the Court explained that in *Heien* it was confronting the “antecedent question” of whether there was a violation of the Fourth Amendment.<sup>238</sup> And yet, despite the heavy presence of the good faith exception in the arguments before the Court, two paragraphs later, the Court drew a distinction between reasonableness under the Fourth Amendment and the inquiry under the qualified immunity standard with no mention of where the good faith exception would fit into the new understanding of the role of mistakes of law.<sup>239</sup>

Although *Heien* has been interpreted by many courts to expand the tolerance for police error under the Fourth Amendment, the failure of the Supreme Court to address the relationship between a Fourth Amendment claim and the good faith relationship may paradoxically provide an opportunity to reconsider the reach of the good faith exception. In every case between December 2014 and December 2015 in which the courts have concluded that the stop violated the Fourth Amendment because the mistake of law was an unreasonable one, the courts have suppressed the evidence without considering the good faith exception.<sup>240</sup> In fact, of the almost 150 cases that cite *Heien*

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<sup>235</sup> Brief for Petitioner-Appellant at 23–34, *Heien*, 135 S. Ct. 350 (No. 13-604); Transcript of Oral Argument at 22–25, *Heien*, 135 S. Ct. 350 (No. 13-604); *Heien*, 135 S. Ct. at 545 (Sotomayor, J., dissenting).

<sup>236</sup> *Heien*, 135 S. Ct. at 539 (majority opinion). The concurrence made this same point. *Id.* at 541 n.1 (Kagan, J., concurring).

<sup>237</sup> *Id.* at 539 (majority opinion).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 539–40.

<sup>240</sup> See, e.g., *United States v. Flores*, 798 F.3d 645 (7th Cir. 2015); *United States v. Alvarado-Zarza*, 782 F.3d 246 (5th Cir. 2015); *United States v. Black*, 104 F. Supp. 3d 997 (W.D. Mo. 2015); *United States v. Sanders*, 95 F. Supp. 3d 1274 (D. Nev. 2015); *Darringer v. State*, 46 N.E.3d 464 (Ind. Ct. App. 2015); *State v. Nelson*, 356 P.3d 1113 (Okla. Crim. App. 2015); *State v. Brown*, No. 13-2054, 2015 WL 4468841 (Iowa Ct. App. July 22, 2015); *People v. Jones*, B255728, 2015 WL 1873269 (Cal. Ct. App. Apr. 23, 2015).

during this time period, only three state courts have acknowledged a good faith exception argument by the government.<sup>241</sup> In addition, a review of the briefs filed in federal court shows that the government has not even argued the good faith exception in these cases. Instead, the government focuses on whether the police officer’s stop of the individual was authorized by the substantive state law, and if not, whether the police officer’s asserted understanding of the law was “objectively reasonable” for purposes of the substantive Fourth Amendment claim.<sup>242</sup>

The failure of the government to argue the good faith exception in these cases is a bit surprising given the fact that before *Heien*, the government did raise the good faith exception to excuse mistaken readings of statutory proscriptions.<sup>243</sup> The simple answer appears to be that once the determination is made that the officer’s mistake of law was unreasonable, then the good faith exception is not—and should not be—available to the government. That is, a failure on the part of a law enforcement agent to understand the scope of a legal prohibition is the type of culpable conduct that justifies the invocation of the exclusionary rule. Such an approach respects basic principles of separation of powers by ensuring that the legislative and executive branches perform the functions assigned to them.<sup>244</sup> Moreover, it is

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<sup>241</sup> In *State v. Tercero*, the court concluded that the police officer’s reading of a statute was unreasonable, and it rejected the government’s attempt to use the good faith exception because Texas has a more restrictive good faith exception than the federal good faith exception. 467 S.W.3d 1, 10 (Ct. App. Tex. 2015). In *State v. Miller*, the court did not reach the good faith argument because it concluded the mistake was a reasonable one under the Fourth Amendment. No. 9-14-50, 2015 WL 5095890, at \*2 (Ct. App. Ohio Aug. 31, 2015). Finally, in the one case to reach the merits of the good faith exception argument, *State v. Heilman*, the Oregon appellate court concluded that the trial court erred in finding the exception available when there is an unreasonable mistake of law made by the officer. 342 P.3d 1102, 1106 n.5 (Ct. App. Ore. 2015).

<sup>242</sup> *Heien*, 135 S. Ct. at 539.

<sup>243</sup> See *United States v. Chanthasouvat*, 342 F.3d 1271, 1279–80 (11th Cir. 2003); *United States v. Lopez-Soto*, 205 F.3d, 1101, 1106 (9th Cir. 2000); *United States v. Lopez-Valdez*, 178 F.3d 282, 289 (5th Cir. 1999). What makes the failure of the government to raise the good faith exception even more peculiar is that these cases predated the Roberts Court’s expansive reading of the exclusionary rule in the *Hudson*, *Herring*, and *Davis* decisions.

<sup>244</sup> Logan, *supra* note 163, at 95–101.

consistent with the results in most of the good faith exception cases, if not the expansive language used by the Court in its most recent opinions on the good faith exception.

As Professor Logan has pointed out, permitting police officers the leeway to make mistakes about the scope of statutory proscriptions raises significant separation of powers issues.<sup>245</sup> Under separation of powers doctrine, the legislature is assigned the principal duty of establishing the boundaries of criminal conduct with the judiciary interpreting the law as appropriate.<sup>246</sup> When a police officer relies on an unreasonable reading of these standards, the courts should not excuse these actions under the good faith exception simply because the prosecutor is able to construct some sort of statutory construction argument that is debatable. Such a result would invite law enforcement to evade the limits placed on police conduct by the legislature. Where a statute is genuinely ambiguous, *Heien* teaches that there is no Fourth Amendment violation because the police conduct was reasonable and, therefore, the police action could be deemed consistent with the will of the legislature.<sup>247</sup> But, once the conclusion is reached that the stop was not based on a reasonable understanding of the law, and therefore the officer ignored the limits placed by the legislature on her conduct, the evidence should be suppressed.

Requiring suppression once a determination is made that the interpretation of the statute is unreasonable also promotes the clarification of the reach of the law.<sup>248</sup> With the division between Fourth Amendment claims and a remedy in terms of either the exclusion of evidence or liability under § 1983, courts may reject the request for relief on remedial grounds without reaching the Fourth Amendment question. This approach can result in a failure to develop the substantive Fourth Amendment law

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<sup>245</sup> *Id.* at 95.

<sup>246</sup> *Id.* Assigning this role to the legislature is consistent with the void for vagueness doctrine. A statute violates due process when it is “so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.” *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015); see *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18–19 (2010); *United States v. Williams*, 553 U.S. 285, 304 (2008).

<sup>247</sup> *Heien v. North Carolina*, 135 S. Ct. 530, 539–40 (2014). As Professor Logan persuasively argues, permitting police to point to ambiguities in the law may have the unintended consequence of excusing sloppy drafting by the legislative branch. Logan, *supra* note 163, at 95–97.

<sup>248</sup> *Id.* at 98.

because the courts can decline to address how the statute should be read by instead ruling that the reading was a “reasonable” one.<sup>249</sup> By equating the “objective reasonableness” standard for both the Fourth Amendment claim and for the good faith exception when the issue is the interpretation of a statute, the courts will be required to issue a clarification on the meaning of the statute, and thereby provide law enforcement with adequate guidance in the future, rather than leaving the scope of the statutory proscription unanswered.<sup>250</sup>

Equating the two standards is also consistent with the Court’s focus on deterrence as the “sole purpose” of the exclusionary rule.<sup>251</sup> The Court’s approach of assuming that the exclusionary rule works solely to deter individual officers from violating the commands of the Fourth Amendment has been amply criticized.<sup>252</sup> But, accepting the deterrence rationale at face value, there should be no good faith exception when a police officer’s action is not based on an objectively reasonable understanding of the scope of statutory proscriptions. Indeed, a corollary to the deterrence rationale is that where evidence is suppressed, the police officers involved will alter their conduct to ensure that evidence seized in the future will not be similarly suppressed. Thus, under the assumption that “sloppy” studies of the law are to be discouraged,<sup>253</sup> the evidence should be suppressed when the police officer acts pursuant to an unreasonable understanding of the law.

Moreover, while the Court’s focus on deterrence at the individual level is difficult to justify, there is support for the notion that the extension of the exclusionary rule to the states helped to play a role in the increased professionalism of the

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<sup>249</sup> See *Heien*, 135 S. Ct. at 544 (Sotomayor, J., dissenting) (“This result is bad for citizens, who need to know their rights and responsibilities, and it is bad for police, who would benefit from clearer direction.”).

<sup>250</sup> Moreover, as Professor Kerr has persuasively written, the existence of a remedy in terms of exclusion of evidence encourages defendants to raise challenges to law enforcement actions. Orin S. Kerr, *supra* note 153, at 1088.

<sup>251</sup> *Davis v. United States*, 564 U.S. 229, 236–37 (2011); see also *Herring v. United States*, 555 U.S. 135, 141–42 (2009).

<sup>252</sup> Thomas K. Clancy, *The Fourth Amendment’s Exclusionary Rule as a Constitutional Right*, 10 OHIO ST. J. CRIM. L., 357, 357 (2013); David Gray, *A Spectacular Non Sequitur: The Supreme Court’s Contemporary Fourth Amendment Exclusionary Rule Jurisprudence*, 50 AMER. CRIM. L. REV. 1, 9–13 (2013); Kinports, *Culpability*, *supra* note 130, at 835–43.

<sup>253</sup> *Heien*, 135 S. Ct. at 539–40 (majority opinion).



police by creating institutional incentives for better training for police officers.<sup>254</sup> Requiring evidence to be suppressed when the police do not have an objectively reasonable understanding of the law should encourage police departments to provide adequate training and updates to police officers on the reach of the substantive law.<sup>255</sup> And because adequate training on the reach of the law helps to guard against police overreaching—and potentially arbitrary police actions—the use of the exclusionary rule in this context, in the words of *Herring* and *Davis*, “pay[s] its way.”<sup>256</sup>

The determination that the good faith exception is not available when there is an unreasonable mistake of law also appears to be consistent, or at least reconcilable, with the general approach to the good faith exception to the exclusionary rule. Despite the broad language the Court used in both *Herring* and *Davis* regarding the limits to the exclusionary rule,<sup>257</sup> the good faith exception remains, at least in name, an exception to the general rule that evidence seized in violation of the Fourth Amendment should be suppressed.<sup>258</sup> Further, in each case, but for *Hudson*, the Court deemed mistaken judgment of the police officers “objectively reasonable.”<sup>259</sup> For example, in *Leon*, the officers applied for a warrant as required by the Fourth Amendment, and they had no indication that the warrant was invalid.<sup>260</sup> Similarly, in *Krull*, there was no indication that the

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<sup>254</sup> Gray, *supra* note 252, at 27 (noting “[t]he real target for deterrence is not the individual officer, but law enforcement agencies of which they are a part” and that “the exclusionary rule creates strong incentives for those agencies to train police officers”); Kinports, *Culpability*, *supra* note 130, at 833 (same); Logan, *supra* note 163, at 103–05 (discussing the importance of training of police officers).

<sup>255</sup> See *Darringer v. State*, 46 N.E.3d 464 (Ind. Ct. App. 2015) (holding the police officer’s mistake of law unreasonable where legislature had amended the law a year before the stop and police officer’s understanding did not include the change made by the legislature).

<sup>256</sup> *Herring*, 555 U.S. at 147–48; *Davis*, 564 U.S. at 238.

<sup>257</sup> See *supra* text accompanying notes 130–42.

<sup>258</sup> It should be noted that, taking the *Strieff* decision together with the good faith exception decisions, there is a reasonable argument that the exclusion of evidence, rather than the suppression of evidence, is in fact the exception. Whether *Strieff* portends a more significant expansion of exceptions to the exclusionary rule, however, is the subject of another article.

<sup>259</sup> Kinports, *Culpability*, *supra* note 130, at 825–26.

<sup>260</sup> *Unites States v. Leon*, 468 U.S. 897, 916–17 (1984). As Professors Kamin and Marceau, among others, have noted, *Leon*’s recognition of the good faith exception when the police obtain a warrant can be understood as consistent with the Fourth

statute the officers were relying on was invalid.<sup>261</sup> In both *Evans* and *Herring*, there was also no reason for the police officers who were stopping the individuals to know that the basis for the stop was factually erroneous. Admittedly, in *Evans*, the mistaken information was transmitted to a police officer from a judicial officer,<sup>262</sup> whereas in *Herring*, the erroneous information came from someone in another police department.<sup>263</sup> Yet, in both cases, the Court viewed the police officers as following the correct procedures under the Fourth Amendment, and, hence, the Court was unwilling to exclude the evidence.<sup>264</sup> And, finally, in *Davis*, the officers’ actions were consistent with binding precedent in the jurisdiction.<sup>265</sup>

*Hudson* is the only case in which it could be concluded that the police who conducted the stop or search had reason to know their conduct was not in accordance with governing law under the Fourth Amendment. In *Hudson*, it was clearly established that police were required to knock and announce before executing a search warrant and the police officers failed to adhere to this rule.<sup>266</sup> The Court, however, broke the chain between the illegality of the police conduct and the evidence seized by the police by determining that the violation “was *not* a but-for cause of obtaining the evidence.”<sup>267</sup> And, while *Hudson’s* comments about the good faith exception were picked up by the Court in *Herring* and in *Davis*, the degree of police culpability in fact was irrelevant to *Hudson’s* holding. *Hudson* created a bright-line rule that evidence seized in violation of the knock-and-announce requirement was never to be suppressed, regardless of the culpability of the officers.<sup>268</sup>

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Amendment’s general preference for warrants. Kamin and Marceau, *supra* note 14, at 614.

<sup>261</sup> *Illinois v. Krull*, 480 U.S. 340, 350 (1987).

<sup>262</sup> *Arizona v. Evans*, 514 U.S. 1 (1995).

<sup>263</sup> *Herring v. United States*, 555 U.S. 135, 138 (2009).

<sup>264</sup> *Evans*, 514 U.S. at 15–16 (“There is no indication that the arresting officer was not acting objectively reasonably when he relied upon the police computer record.”); *Herring*, 555 U.S. at 140 (explaining “[t]he Coffee County officers did nothing improper”).

<sup>265</sup> *Davis v. United States*, 564 U.S. 229, 241 (2011) (explaining that “when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities”).

<sup>266</sup> *Hudson v. Michigan*, 547 U.S. 586, 590 (2006).

<sup>267</sup> *Id.* at 592.

<sup>268</sup> *Kinports, Culpability*, *supra* note 130, at 829.

In short, once there is an unreasonable understanding of the substantive law, the good faith exception should not permit the government to introduce the evidence discovered through the unlawful conduct. That is, an objectively unreasonable understanding of the substantive law renders the officer culpable for purposes of the good faith exception. Thus, the fact that the lower courts who have determined that the mistake of law was unreasonable post-*Heien* were correct in not exploring the good faith exception. But, if this understanding of the relationship between the requirements of the Fourth Amendment and the good faith exception is correct, the understanding casts some doubt on the relationship between the good faith exception and the doctrine of qualified immunity. Recall that eight members of the Court drew a distinction between mistakes that are “objectively reasonable” for purposes of a Fourth Amendment claim and “objectively reasonable” mistakes for purposes of an officer’s qualified immunity claim. If the first premise of this paragraph is correct—that a mistake of law that is not objectively reasonable under the Fourth Amendment is also not objectively reasonable for purposes of the good faith exception—and if we accept *Heien*’s conclusion that a mistake of law can be unreasonable for a Fourth Amendment claim but reasonable for purposes of a qualified immunity claim, then the question arises as to whether there is a distinction between what is an “objectively reasonable” mistake for purposes of the good faith exception and what is “objectively reasonable” for purposes of qualified immunity. And, that question in turn may suggest rethinking the reach of the good faith exception.

### III. A RETHINKING OF THE GOOD FAITH EXCEPTION

It may be possible that *Heien* could provide a vehicle to reconsider the expansive language of the most recent good faith exception cases and limit the reach of the exception when a police officer misapprehends the reach of the Fourth Amendment.<sup>269</sup>

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<sup>269</sup> The attempt in this Article to limit the reach of the good faith exception may have been made more difficult by a decision released after this Article was written, *Utah v. Strieff*, 136 S. Ct. 2056 (2016), in which the Court arguably increased its tolerance for constitutional violations by incorporating some of the culpability concerns of the good faith exception into the attenuation doctrine. In *Strieff*, the Court concluded that the attenuation doctrine can apply when the officer unconstitutionally stopped an individual and in the stop discovered that the suspect had an outstanding warrant which in turn led to an arrest and search that produced

Both the majority and concurring *Heien* opinions distinguished mistakes as to the scope of the statutory proscription from mistakes as to the scope of the Fourth Amendment itself.<sup>270</sup> This distinction means that a police officer can misapprehend the scope of a traffic regulation and have the stop conform to the Fourth Amendment, but if the officer misapprehends the commands of the Fourth Amendment itself, then there is a violation of the Constitution. In addition, the majority and concurring opinions distinguish between mistakes for purposes of a Fourth Amendment claim and mistakes that are unreasonable for purposes of qualified immunity.<sup>271</sup> These two distinctions leave one to wonder where the good faith exception fits into the continuum between a substantive Fourth Amendment claim and a qualified immunity claim.

There seem to be three choices. The first choice is to read the good faith standard as the same standard used in the qualified immunity context. But, as was discussed in the preceding section, this conclusion is contrary to the approach the lower courts have taken and would encourage the “sloppy study of law” that the *Heien* Court seemed to be concerned about. The other alternatives are to reconceive the good faith exception as part of the substance of the Fourth Amendment or to limit the applicability of the good faith exception. It is to those latter two alternatives to which this Article now turns.

Applying the logic of *Heien*, it is difficult to understand the distinction being drawn by the Court between a mistake regarding the contours of the Fourth Amendment and a mistake regarding the meaning of a statutory prohibition. After all, the Court has made clear that “reasonableness” is the “ultimate

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drugs on the arrestee. *Id.* at 2064. As part of the Court’s analysis, the Court concluded that the evidence was admissible because the initial stop was not a “purposeful or flagrant violation” of the Constitution. *Id.* at 2063. The relationship between the good faith exception and the attenuation doctrine, as well as the Court’s willingness to accept police errors, remains in a state of flux, particularly because Justice Breyer, who authored dissents in *Hudson*, *Herring*, and *Davis*, joined the majority in *Strieff*.

<sup>270</sup> *Heien v. North Carolina*, 135 S. Ct. 530, 539 (2014) (“An officer’s mistaken view that the conduct at issue did *not* give rise to [a Fourth Amendment] violation—no matter how reasonable—could not change that ultimate conclusion.”); *id.* at 541 n.1 (Kagan, J., concurring) (asserting that “one kind of mistaken legal judgment—an error about the contours of the Fourth Amendment itself—can never support a search or seizure”).

<sup>271</sup> *Id.* at 540–41.

touchstone” for substantive Fourth Amendment claims. Just as an officer may make a mistake as to the facts or as to the scope of a legal prohibition, an officer could have a reasonable, yet erroneous view of the requirements of the Fourth Amendment. The majority in *Heien*'s reasoning was that because reasonable officers can make mistakes of law as well as mistakes of fact, the requirements of the Fourth Amendment can be met when mistakes of either kind are made as long as those mistakes are reasonable ones.<sup>272</sup> It is not clear why this same logic does not apply to the requirements of the Fourth Amendment itself.

Rather, as Richard Re suggested in his recent article, it could make more sense to consider reasonable mistakes in determining whether there was a Fourth Amendment violation as opposed to considering the mistakes within the context of an exception to the exclusionary rule.<sup>273</sup> Under Re's view, the good faith exception is a misnomer, and the cases decided as good faith exceptions should be better explained as concluding that the challenged conduct was reasonable, and hence there was no Fourth Amendment violation.<sup>274</sup> And, with *Heien*'s recognition that mistakes of law still render a search consistent with the Fourth Amendment, Re's approach is appealing.<sup>275</sup>

In the good faith cases, the Court has largely faced situations in which the law enforcement officer's actions could be deemed reasonable based on the information before the officers had at the time.<sup>276</sup> Whether the officer relied on a facially valid warrant,<sup>277</sup> information provided by a third party,<sup>278</sup> or available case law,<sup>279</sup> the Court asked whether the officer is “‘act[ing] as a reasonable officer would and should act’ under the circumstances.”<sup>280</sup> And yet, that is precisely what the Court is asking the lower courts to

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<sup>272</sup> *Id.* at 536 (majority opinion).

<sup>273</sup> Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1942–44 (2014).

<sup>274</sup> *Id.*

<sup>275</sup> It is also appealing because Re suggests grounding the exclusionary rule in the due process clause as opposed to the Fourth Amendment. *Id.* at 1912–18. This suggestion would provide a constitutional basis for the exclusionary rule, rather than simply viewing the exclusionary rule as a judicially created remedy.

<sup>276</sup> That is, leaving aside *Hudson*. See *supra* text accompanying notes 262–68.

<sup>277</sup> *United States v. Leon*, 468 U.S. 897, 900 (1984).

<sup>278</sup> *Arizona v. Evans*, 514 U.S. 1, 16 (1995); *Herring v. United States*, 555 U.S. 135, 147 (2009).

<sup>279</sup> *Davis v. United States*, 564 U.S. 229, 240 (2011).

<sup>280</sup> *Id.* at 241 (quoting *Leon*, 468 U.S. at 920).

decide in the Fourth Amendment mistake cases.<sup>281</sup> Moreover, the good faith cases overlap with the mistake cases. For example, in *Michigan v. DeFillippo*,<sup>282</sup> the Court found that an arrest based on a subsequently invalidated statute was nonetheless supported by probable cause, whereas in *Illinois v. Krull*,<sup>283</sup> the Court used the good faith exception to allow the government to use evidence obtained when officers relied on a statute later invalidated. It is difficult to discern why the different doctrines were used in these two cases—beyond the obvious point that the advocates relied on different doctrines. Similarly, whereas in *Rodriguez* the Court asked whether the police mistake—that someone had the authority to consent to a search—was reasonable and therefore there was no violation of the Fourth Amendment,<sup>284</sup> in *Herring* the Court considered whether the police mistake—thinking there was an outstanding warrant—could be excused under the good faith exception.<sup>285</sup> In fact, even the Supreme Court in *Herring* recognized that the standard of probable cause allows for error, and, thus, it was possible to conclude in that case that there was no Fourth Amendment violation to begin with.<sup>286</sup>

The problem with treating all good faith cases as substantive Fourth Amendment cases, however, is that this approach fails to adequately account for the fact that a majority of the Court views the exclusionary rule with significant distaste.<sup>287</sup> In good faith exception cases, the Court has expressed culpability concerns that go beyond looking at whether the conduct is reasonable and instead asks whether the conduct was “deliberate, reckless, or grossly negligent.”<sup>288</sup> As a result, a possible consequence of adopting the view that the good faith exception cases should really be viewed as reasonableness cases under the Fourth Amendment is that the Court could incorporate the culpability concerns of the good faith exception into the substance of the Fourth Amendment itself. And incorporating the culpability

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<sup>281</sup> *Heien v. North Carolina*, 135 S. Ct. 530, 539 (2014); *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990).

<sup>282</sup> 443 U.S. 31, 37 (1979).

<sup>283</sup> 480 U.S. 340, 359–60 (1987).

<sup>284</sup> *Rodriguez*, 497 U.S. at 188.

<sup>285</sup> *Herring v. United States*, 555 U.S. 135, 147 (2009).

<sup>286</sup> *Id.* at 139.

<sup>287</sup> This distaste was reiterated in the *Strieff* decision rendered this term. See *supra* note 144 and accompanying text.

<sup>288</sup> *Herring*, 555 U.S. at 144.

language of *Herring* and *Davis* into the Fourth Amendment itself could result in a significant constriction of the protections offered by the Fourth Amendment.<sup>289</sup> If the Court were to import its culpability requirements from the recent good faith cases into its understanding of what is “objectively reasonable” for purposes of a Fourth Amendment claim, the amount of protections offered by the Fourth Amendment would surely shrink. Moreover, such an approach would ignore the substantial divide between Fourth Amendment rights and remedies that the Court has adhered to since *Leon*, which has arguably permitted the Court to continue to revisit the reach of the Fourth Amendment.<sup>290</sup>

If the reasonableness for the good faith exception is different from the reasonableness for substantive Fourth Amendment claims, and is also different from the qualified immunity standard, the result is a conundrum as to how to view the standard of “objective reasonableness” for purposes of the good faith exception. The good faith exception standard and the qualified immunity standard are essentially the same when dealing with a search pursuant to a warrant.<sup>291</sup> There is also an overlap in cases when the officer is acting pursuant to case law that authorizes the conduct.<sup>292</sup> But, perhaps *Heien’s* distinction between objectively reasonable mistakes for Fourth Amendment and qualified immunity purposes means that the good faith exception is not always available to law enforcement as a possible argument. Rather, perhaps the exception should be limited to

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<sup>289</sup> This is true at least if one does not accept Re’s suggestion to reconceptualize the exclusionary rule as a requirement of the due process clause rather than the Fourth Amendment. See Re, *supra* note 273, at 1912. By placing the exclusionary rule within the due process clause, Re avoids the problems identified in this paragraph. But, it requires the Court to accept the due process argument.

<sup>290</sup> Judge Wilkinson has argued that this dichotomy allows the courts to use the rhetoric of rights as an aspirational goal, while limiting the impact of that rhetoric in particular cases. J. Harvey Wilkinson III, *The Dual Lives of Rights: The Rhetoric and Practice of Rights in America*, 98 CAL. L. REV. 277, 279–80 (2010). In a different approach that also acknowledges the divide between rights and remedies, Professors Kamin and Marceau suggest that one way out of the double reasonableness bind of the good faith exception is to accept the good faith exception culpability analysis, but replace the reasonableness test for substantive Fourth Amendment claims with fixed rules so that there are clear rules to guide law enforcement conduct. Kamin and Marceau, *supra* note 14, at 627–31.

<sup>291</sup> See *Davis*, 564 U.S. at 240.

<sup>292</sup> *Davis* makes clear that the good faith exception applies when the officer acts in accordance with binding precedent. *Id.* at 241. Similarly, officials are protected from individual liability when their conduct conforms with precedent, as they are protected so long as their conduct does not violate clearly established law.

situations in which the error can be attributed to someone other than the investigatory officers themselves. In short, the convergence between the good faith exception and qualified immunity standard should be understood to be a limited one.

Under this understanding, when the police officers themselves acted under an erroneous understanding of the Fourth Amendment—unsupported by precedent or judicial authorization—the good faith exception would not be available to allow the use of the evidence against the defendant, even if the officer would not be held liable under qualified immunity. Adopting this approach could resolve a current circuit split over whether the good faith exception is available when police violate the Fourth Amendment and use illegally obtained information to obtain a warrant.<sup>293</sup> Both the Sixth and Eighth Circuits have extended the good faith exception to situations in which the initial conduct by the officers was a reasonable mistake in the reading of the Fourth Amendment.<sup>294</sup> Other circuits rightly disagree.<sup>295</sup> Permitting the government to argue that the investigating officers made a “reasonable mistake” under the Fourth Amendment undermines the *Heien* Court’s determination to exclude the reach of the Fourth Amendment from the “reasonable mistakes” that can be consistent with the demands of the Fourth Amendment.

Limiting the reach of the good faith exception, as this Article suggests, would honor the Court’s recognition that searches and seizures conducted without a warrant are “per se unreasonable” unless they fall within “specifically established and well-delineated exceptions.”<sup>296</sup> It would also acknowledge the reality that without the exclusionary rule, there may be no effective remedy for a Fourth Amendment violation, and, hence, little incentive for local jurisdictions to provide effective training and

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<sup>293</sup> See Hadar Aviram et al., *Moving Targets: Placing the Good Faith Doctrine in the Context of Fragmented Policing*, 37 *FORDHAM URB. L.J.* 709, 718 (2010); Andrew Z. Lipson, Note, *The Good Faith Exception as Applied to Illegal Predicate Searches: A Free Pass to Institutional Ignorance*, 80 *HASTINGS L.J.* 1147, 1147–48 (2009).

<sup>294</sup> *United States v. Fugate*, 499 F. App’x 514, 519 (6th Cir. 2012), cert. denied, 136 S. Ct. 33 (2015); *United States v. McClain*, 444 F.3d 556, 566 (6th Cir. 2005); *United States v. White*, 890 F.2d 1413, 1419 (8th Cir. 1989).

<sup>295</sup> *United States v. McGough*, 412 F.3d 1232, 1239 (11th Cir. 2005); *United States v. Wanless*, 882 F.2d 1459, 1466–67 (9th Cir. 1989).

<sup>296</sup> *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2452 (2015).



oversight of law enforcement personnel.<sup>297</sup> Thus, when the source of the error was not the officer, the good faith exception would be available to the government. But, where the source of the error was the officer, the good faith exception would not be available, even if a court would likely provide the officer with qualified immunity if the issue arose in a § 1983 action. Or, put differently, police officers do not engage in “objectively reasonable law enforcement activity”<sup>298</sup> when they violate the Fourth Amendment by not seeking a warrant or acting in accordance with established law.

### CONCLUSION

The decision in *Heien* clearly expanded the leeway offered to police officers under the Fourth Amendment. At the same time, what purports to be a relatively simple decision with the agreement of eight justices raises more questions than it answers. Indeed, a review of the cases decided since *Heien* shows that, as Justice Sotomayor’s dissent predicted,<sup>299</sup> the “objective reasonableness” standard that the Court presented as a relatively simple proposition is anything but simple. The lower courts are significantly divided as to how to view alleged mistakes in interpretation, with many offering greater tolerance for police error than was perhaps envisioned by the Court.

At the same time, *Heien* paradoxically offers the possibility of rethinking the good faith exception. While qualified immunity and the good faith exception share the divorce of rights and remedies and rhetoric of blameworthiness, *Heien*’s distinction between errors for purposes of the Fourth Amendment and errors

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<sup>297</sup> See *Davis*, 564 U.S. at 259 (Breyer, J., dissenting) (explaining that “the exclusionary rule is often the only sanction available for a Fourth Amendment violation”); *Herring v. United States*, 555 U.S. 135, 153–57 (Ginsburg, J., dissenting) (2008) (arguing that not only is the exclusionary rule often the only sanction available, but also that the Court’s approach deprives police departments of incentives to take precaution to ensure the integrity of the information on their databases). Indeed, Justice Ginsburg expressly addressed the assertion that the exclusionary rule was unnecessary given the professionalism of current police practices: “It has been asserted that police departments have become sufficiently ‘professional’ that they do not need external deterrence to avoid Fourth Amendment violations. But professionalism is a sign of the exclusionary rule’s efficacy—not of its superfluity.” *Id.* at 156 n.6 (citations omitted).

<sup>298</sup> *Davis*, 564 U.S. at 241 (majority opinion).

<sup>299</sup> *Heien v. North Carolina*, 135 S. Ct. 530, 547 (2014) (Sotomayor, J., dissenting).

for purpose of qualified immunity suggests that the good faith exception may occupy a different space than the qualified immunity standard. Thus, while the Court has called for an evaluation of the culpability of the officer, that evaluation is appropriate where the police officer has done what could be reasonably expected—acted in accordance with binding precedent, applied for a warrant that appeared valid, asked for information that later turned out to be inaccurate. Where, however, the police officer acts without a warrant, and outside what has been authorized by precedent as consistent with the Fourth Amendment, the evidence cannot come in under the good faith exception. And, if that is true, the extensive language employed by the Court in its good faith trilogy may have some limits.